No. 11587

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

L. H. McCLINTOCK and FLORENCE L. McCLINTOCK, copartners, doing business under the fictitious name and style of McCLINTOCK DISPLAY COMPANY,

Appellants,

vs.

HARRY C. WESTOVER, Collector of Internal Revenue,

Appellee.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

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Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

Page

INDEX TO EXHIBITS

Plaintiff's Exhibits:

NAMES AND ADDRESSES OF ATTORNEYS:

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GEORGE M. BRYANT
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EUGENE HARPOLE

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600 U. S. Post Office and Court House Building
Los Angeles 12, Calif. [1*]

*Page number appearing at foot of Certified Transcript.

In the District Court of the United States in and for the Southern District of California

Central Division

No. 5114-O'C Civ.

L. H. and FLORENCE L. McCLINTOCK d.b.a. McCLINTOCK DISPLAY CO., a copartnership,

Plaintiffs,

vs.

HARRY C. WESTOVER, Collector of Internal Revenue,

Defendant.

COMPLAINT FOR REFUND OF EXCISE TAX

Come now the plaintiffs in the above entitled action and for cause of action against the defendant, complain and allege:

I.

That at all times herein mentioned, plaintiffs were and now are copartners doing business under the firm name and style of McClintock Display Co., and have fully complied with the provisions of Sections 2466-2468 of the Civil Code of the State of California by filing a certificate of fictitious firm name with the County Clerk of the County of Los Angeles, State of California, and publishing the same as required by law. [2]

II.

That the defendant herein was the Collector of Internal Revenue for the Sixth District of California from the first day of July, 1943, to the date of filing of this action; and that the tax sued for herein was paid to him

in his official capacity as such Collector of Internal Revenue.

III.

That the question involved herein is one arising under the laws of the United States of America, providing for internal revenue and more specifically Section 3444 of the Internal Revenue Code.

IV.

That at all times herein mentioned plaintiffs have been and now are engaged in the business of manufacturing a decorative rubber leaf with the appearance of parsley, for use as a decoration in meat and vegetable display cases; that plaintiffs also were at all times herein mentioned and now are engaged in and operate a display service business in which they use certain quantities of the decorative rubber leaf manufactured by them; that said display service business consists of delivering and installing in markets varying quantities of said decorative rubber leaf, of picking up the said rubber leaf when the same becomes soiled, of replacing such soiled units with new or renovated units, of renovating said soiled units and of maintaining a stock of new and renovated units, for which service plaintiffs made varying charges.

V.

That in certain areas where plaintiffs did not engage in the display service business they sold their product to meat and vegetable dealers at 34½ Cents per 18 inch unit; that during the period from October 1, 1941, to October 31, 1942, said plaintiffs sold $12,710.23 worth of their product to meat and vegetable dealers and used $28,115.80 worth thereof in their display service business, the value

of the product used in the display service business was computed at 34½ Cents per 18 inch unit, plaintiffs' regularly established wholesale selling price. [3]

VI.

That on or about the 10th day of March, 1943, the Commissioner of Internal Revenue on the Miscellaneous List for January 1943, page 6172-5, assessed the sum of $22,507.23, plus $5,417.54, and $1,001.54, against the plaintiffs to cover tax, penalty and interest respectively on the sale of articles manufactured from rubber, and on the total income derived from use of articles so manufactured in connection with the display service business operated by plaintiffs.

VII.

That on or about the 26th day of January, 1944, plaintiffs paid to Harry C. Westover, the Collector of Internal Revenue for the Sixth District of California, $22,507.23, and $2,248.37, to cover tax and interest respectively, as demanded by said Collector of Internal Revenue; that on or about the 24th day of December, 1943, the Commissioner of Internal Revenue abated the penalty included in the assessment referred to in Paragraph VI hereof in the amount of $5,417.54.

VIII.

That on or about the 13th day of October, 1944, the plaintiffs herein filed their claim for refund, a copy of which is attached hereto, marked Exhibit "A", and by this reference incorporated herein as fully as though set forth herein in full, in the sum of $20,673.38, covering a portion of the tax and interest paid on the above assessment, with Harry C. Westover, the Collector of Internal Revenue for the Sixth District of California, at his office

in the City of Los Angeles, State of California; that said claim for refund was filed on official form 843, within the time and in the manner provided by law.

IX.

That on or about the 16th day of April, 1945, the Commissioner of Internal Revenue of the United States, rejected and disallowed plaintiffs' said claim for refund.

X.

That plaintiffs were taxable upon the use of all rubber leaf used in connection with the display service business operated by them in accordance with [4] Section 3444 of Internal Revenue Code and Section 316.7 of Regulations 46 promulgated thereunder; that sales of rubber leaf on the open market and the value of rubber leaf used in connection with plaintiffs' display service business during the period from the first day of October, 1941, to the 31st day of October, 1942, and the tax computed thereon, were as follows:

	Net Taxable Amount Tax Included		Tax Due On		
Date 1941	Sales to Others per Revenue Agent	Sales to Rental Department	Sales to Others per Revenue Agent	Sales to Rental Department	Total
October	$ 687.85	$ 7,354.02	$ 62.53	$ 668.55	$ 731.08
November	507.33	6,019.22	46.12	547.20	593.32
December	561.82	3,976.13	51.07	361.47	412.54
1942					
January	293.06	5,696.64	26.64	517.88	544.52
February	194.91	2,016.87	17.72	183.35	201.07
March	86.17	119.03	7.83	10.82	18.65
April	72.12	582.02	6.56	52.91	59.47
May	45.00	50.72	4.09	4.61	8.70
June	162.04	2,301.15	14.73	209.20	223.93
July	254.39		23.13		23.13
August	2,936.37		266.94		266.94
September	4,820.15		438.20		438.20
October	2,089.02		189.91		189.91
	$12,710.23	$28,115.80	$1,155.47	$2,555.99	$3,711.46

XI.

That the Commissioner of Internal Revenue has illegally and unlawfully taxed plaintiffs on the total income received from the operation of their display service business during the period from the first day of October, 1941, to the 31st day of October, 1942, in the amount of $18,-795.77, together with inter- [5] est thereon in the sum of $1,877.61.

XII.

That plaintiffs did not increase their prices to include the tax sued for herein and did not collect it from their customers either directly or indirectly.

Wherefore, plaintiffs pray for judgment against defendant in the sum of $20,673.38, together with interest thereon from date of payment and for such other and further relief as the Court deems fitting and proper.

RILEY AND HALL

By Richard K. Yeamans

Attorneys for Plaintiffs [6]

EXHIBIT "A"

Form 843

Treasury Department

Internal Revenue Service

(Revised April 1940)

CLAIM

To Be Filed With the Collector Where Assessment Was Made or Tax Paid

Collector's Stamp
(Date received)

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

[x] Refund of Tax Illegally Collected.

[ ] Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

[ ] Abatement of Tax Assessed (not applicable to estate or income taxes).

State of California

County of Los Angeles—ss:

[Type or Print]

Name of taxpayer or purchaser of stamps L. H. Mc Clintock and Florence L. McClintock, d.b.a. McClintock Display Co., a Partnership

Business address

3044 Riverside Drive	Los Angeles	California
(Street)	(City)	(State)

Residence.....

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of

the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed 6th District California
2. Period (if for income tax, make separate form for each taxable year) from October 1, 1941, to October 31, 1942
3. Character of assessment or tax Excise taxes, rubber articles, Sec. 3406 (a) (7) Internal Revenue Code
4. Amount of assessment, $24,755.60; dates of payment 1-26-44
5. Date stamps were purchased from the Government .....
6. Amount to be refunded $20,673.38
7. Amount to be abated (not applicable to income or estate taxes) $.....
8. The time within which this claim may be legally filed expires, under Section ..... of the Revenue Act of 19....., on ....., 19.....

The deponent verily believes that this claim should be allowed for the following reasons:

See Statement Attached

(Attach letter-size sheets if space is not sufficient)

McCLINTOCK PRODUCT

Signed McCLINTOCK DISPLAY CO.,
a Partnership.

By L. H. McClintock

By Florence L. McClintock

Sworn to and subscribed beforee me this 5th day of October, 1944

(Seal) R. C. Garcia

(Signature of officer administering oath)

Notary Public in and for the County of Tulare, State of California (Title)

The above Claim for Refund was prepared by the undersigned upon facts furnished by the taxpayer, which facts I believe to be true and correct.

John T. Riley [7]

The McClintock Display Co. is a partnership owned and operated by L. H. and Florence L. McClintock since December, 1934. Since its organization it has been engaged in the business of renting and selling a decorative leaf. Prior to April 13, 1937, the company purchased from W. J. Voit Rubber Corporation, 2616 Nevin Avenue, Los Angeles, California, rubber manufactured for its particular use. This rubber consisted of pure pale crepe rubber processed in the color of green and was formed into a thin rubber ribbon four inches wide. It ranged in cost from 31¢ to 39¢ per pound.

About April 13, 1937, the company, in order to have a better product, began to purchase pure crepe rubber in bales direct from the Dutch East Indies through C. P. Hall Company, Los Angeles. The company takes this rubber strip and runs it through a machine which makes an irregular cut through the middle of the rubber strip. When separated the rubber then has a leaf effect. Two or more thicknesses of this strip are then sewn together and inserted in a galvanized strip. These strips range from 12

to 24 inches in length. The strips are then given a treatment that gives a bright green color to them.

Taxpayer then rented these strips to butcher shops and markets and others for displaying meats and vegetables. The taxpayer's service consisted of installing this rubber leaf in the markets. It serviced these displays by picking up same when soiled which ranged from two to four months. The soiled units were replaced with clean display units. The units picked up were brought to taxpayer's factory where they were washed and freshened up with a lacquer and again used for replacing.

In certain areas which the taxpayer did not service directly, it made outright sales to butcher supply houses and retail meat markets. The taxpayer rented the rubber leaf to chain stores for an average price of approximately 5¢ for an 18 inch unit per month. The rentals charged to independent stores and small users was on an average of 7¢ per 18 inch unit. In the eastern section of the United States, the taxpayer had representatives to whom he shipped a supply of the rubber leaf and charged them a flat price of from 4¢ to 4½¢ a [8] unit. These representatives rented the leaf for such prices per unit as they desired. All soiled units were shipped back to the taxpayer in Los Angeles where same was washed and freshened up and the eastern representatives were furnished with cleaned units. The average life for the leaf is approximately four years, although the taxpayer has some leaf in service of a longer life.

As of October 1, 1941, the taxpayer had on hand 538 new units which were manufactured prior to October 1, 1941; used units on hand at taxpayer's place of business 160,609; out on rent 302,949 units. On November 1,

1942, the taxpayer had on hand 27,030 new units which were never rented.

There is attached thereto marked "Exhibit A" and by reference made a part hereof, a schedule showing sales in dollars made to others during the period October 1, 1941, to October 31, 1942. There is also shown on this schedule the dollar value of new units on hand October 1, 1941, and of new units produced during the period October 1, 1941, to October 31, 1942, termed "sales to rental department." This dollar value is computed at 34½¢ per 18 inch unit which is the taxpayer's wholesale price and the amount charged to butcher supply houses and independents purchasing at wholesale price. This schedule shows the amount of tax due on these sales and the amount of tax on the units manufactured by the taxpayer during the period computed on the wholesale price.

There is attached hereto marked "Schedule A-1" and by reference made a part hereof, a schedule showing the number of units on hand as of October 1, 1941, and the number produced from October 1, 1941, to June 30, 1942. There was no further production after June 30, 1942, inasmuch as all of the taxpayer's crude rubber on hand was taken over by the Rubber Reserve Corporation on May 1, 1942, and July 28, 1942.

There is attached hereto and marked "Schedule A-2" and by reference made a part hereof, a schedule showing the cost of producing 82,170 units, said number representing the total number produced during the period October 1, 1941, to June 30, 1942. The cost of producing each unit was 20.043¢. [9]

There is attached hereto and marked "Schedule A-3" and by reference made a part hereof, a schedule showing

inventory of new units on hand, used units on hand, number of units on rental, number of units manufactured each month, number of units washed and brightened and number of units sold as of the first of each month from October, 1941, to November, 1942.

The tax covered by this Claim has not been added to the selling price of the articles sold or to the rental price of the articles rented and neither has it been billed as a separate item nor collected directly or indirectly.

The Commissioner has assessed a tax based upon total amounts received by the taxpayer from sales to others and from rental received on both new and old units. It is the contention of the taxpayer that the tax should be computed pursuant to the Provisions of Section 3444 of the Internal Revenue Code and Section 316.7 of Regulations 46:

(1) Upon the sales price received from sales to others, and

(2) Upon the fair wholesale market price on the units produced and used by the taxpayer in connection with his rental business which is at the rate of 34½¢ for each 18 inch unit as shown by Exhibit A and Schedule A-1 attached hereto and by reference made a part hereof.

McCLINTOCK DISPLAY CO., a Partnership
By L. H. McClintock
By Florence L. McClintock

Subscribed and sworn to before me this 5th day of October, 1944.

(Seal) R. C. Garcia
Notary Public in and for the County of Tulare, State of California [10]

Exhibit A

McCLINTOCK DISPLAY CO.

(A Copartnership)

Manufacturer's Excise Tax on Rubber Articles—
Decorative Rubber Leaf

October 1, 1941, to October 31, 1942

	Net Taxable Amount Tax Included		Tax Due On		
Date	Sales to Others per Revenue Agent	Sales to Rental Department Schedule 1	Sales per Revenue Agent	Sales to Rental Department	Total
1941					
October	$ 687.85	$ 7,354.02	$ 62.53	$ 668.55	$ 731.08
November	507.33	6,019.22	46.12	547.20	593.32
December	561.82	3,976.13	51.07	361.47	412.54
1942					
January	293.06	5,696.64	26.64	517.88	544.52
February	194.91	2,016.87	17.72	183.35	201.07
March	86.17	119.03	7.83	10.82	18.65
April	72.12	582.02	6.56	52.91	59.47
May	45.00	50.72	4.09	4.61	8.70
June	162.04	2,301.15	14.73	209.20	223.93
July	254.39		23.13		23.13
August	2,936.37		266.94		266.94
September	4,820.15		438.20		438.20
October	2,089.02		189.91		189.91
	$12,710.23	$28,115.80	$1,155.47	$2,555.99	$3,711.46

Schedule A-1

McCLINTOCK DISPLAY CO.

(A Copartnership)

Sales of New Eighteen Inch Rubber Leaf Decorative Units to Rental Department,

October 1, 1941, to October 31, 1942

Date	Number of Units: Total Produced	Sales to Others	Sold to Rental Department	At Wholesale Unit Price	Amount of Sales to Rental Department
1941					
Inventory, October 1, 1941	538.00)	958.00	21,316.00	.345	$ 7,354.02
October	21,736.00)				
November	17,569.00	122.00	17,447.00	.345	6,019.22
December	11,594.00	69.00	11,525.00	.345	3,976.13
1942					
January	16,512.00		16,512.00	.345	5,696.64
February	5,846.00		5,846.00	.345	2,016.87
March	345.00		345.00	.345	119.03
April	1,727.00	40.00	1,687.00	.345	582.02
May	171.00	24.00	147.00	.345	50.72
June	6,670.00		6,670.00	.345	2,301.15
July					
August		57.00	(57.00)		
September		30.00	(30.00)		
October					
	82,708.00	1,300.00	81,408.00		$28,115.80

Schedule A-2

McCLINTOCK DISPLAY CO.

Cost of New Rubber Leaf Units Manufactured During the Period October 1, 1941, to October 31, 1942

Green Rubber		
Produced during period:		
No. IX Thin Pale Latex Crepe—70 barches of 60 pounds each—4,200 pounds at 21.375¢ per pound	$ 897.75	
Processing—6,600 pounds at 13.5¢ per pound	891.03	
Chemicals—70 batches at $4.93 each	345.10	
Cost of 6,600 pounds of green rubber at 32.33¢ per pound	$ 2,133.88	
Add inventory at beginning—13,812 pounds at 32¢ per pound	4,419.84	
	$ 6,553.72	
Deduct inventory at end—none	—0—	
Green rubber used—20,412 pounds at 32.01¢ per pound		$ 6,553.72
Use tax on rubber used—3% of $897.75		26.93
Metal clips and holders:		
Material purchased	$ 348.57	
Add inventory at beginning	965.91	
	$ 1,314.48	
Deduct inventory at end	141.94	
Metal cost of clips used		1,172.54
Dipping:		
Chemicals purchased	$19,947.96	
Add inventory at beginning	569.77	
	$20,517.73	

Schedule A-2 (Cont'd)

McClintock Display Co.

Cost of New Rubber Leaf Units Manufactured During the Period October 1, 1941, to October 31, 1942

Forwarded			$20,517.73	
Deduct inventory at end			7,904.95	
Material used			$12,612.78	
Allocated to production of new units on the basis of production.				
New units	82,170	7.91%	$ 997.67	997.67
Service units	957,197	92.9	11,615.11	
Total	1,039,367	100.00%	$12,612.78	
Sewing materials				324.40
Direct labor				4,989.79
Manufacturing overhead				2,404.57
Cost of producing 82,170 new units (20.043 cents each)				$16,469.62

[14]

Schedule A-3

McCLINTOCK DISPLAY CO.

Inventory, Production and Sales Statistics for the Period October 1, 1941, to October 31, 1942

	Inventory First of Each Month		Number of Units on Rental First of Each Month	Number of New Units Manufactured During Each Month	Number of Used Units Washed and Brightened each Month	Number of Units Sold to Others Each Month	
	New Units	Used Units				New	Used
October, 1941	538	160,609	302,949	21,735	71,421	958	1,042
November	1,228	173,874	304,657	17,569	78,161	122	1,303
December	4,160	171,409	307,074	11,594	98,471	69	1,811
January, 1942	26,286	130,168	310,762	16,512	79,291		1,194
February	43,582	157,380	293,665	5,846	90,608		207
March	40,182	166,169	282,078	345	90,386		227
April	40,608	171,811	287,992	1,727	78,324	40	92
May	34,152	168,086	292,516	171	49,841	24	402
June	32,278	144,772	294,577	6,670	71,453		297
July	41,080	136,766	295,844		68,139		762
August	32,102	135,106	281,998		66,903	57	14,555
September	29,522	139,216	269,227		47,170	30	10,624
October	28,988	138,584	260,455		67,029		
November	27,030	134,909	252,327				
				82,170	957,197	1,300	32,516

[15]

[Verified.]

[Endorsed]: Filed Feb. 7, 1946.] [16]

[Title of District Court and Cause]

ANSWER

Comes now the defendant in the above entitled action and in answer to plaintiffs' complaint admits, denies and alleges:

I.

In answer to Paragraph I thereof, defendant states that he is without knowledge or information sufficient to form a belief as to the truth of the allegations therein contained.

II.

Admits the allegations contained in Paragraph II thereof.

III.

Admits the allegations contained in Paragraph III thereof, except that defendant denies that the question involved herein is one arising specifically under Section 3444 of the Internal Revenue Code.

IV.

In answer to Paragraph IV thereof, defendant states that he is without the knowledge or information sufficient to form a belief as [17.] to the truth of the allegations therein contained.

V.

In answer to Paragraph V thereof defendant states that he is without knowledge or information sufficient to form a belief as to the truth of the allegations therein contained.

VI.

Defendant denies the allegations contained in Paragraph VI thereof except that defendant admits that on or about

the 10th day of March, 1943, the Commissioner of Internal Revenue on the Miscellaneous List for January, 1943, page 6172-5, assessed the sum of $22,507.23 plus $5417.54, and $1,001.54 against the plaintiffs to cover tax, penalty and interest respectively.

VII.

Admits the allegations contained in Paragraph VII thereof.

VIII.

Denies the allegations contained in Paragraph VIII of the Complaint except defendant admits that on or about the 13th day of October, 1944, the plaintiffs herein filed their claim for refund in the sum of $20,673.38 covering a portion of the tax and interest paid on the above assessment with Harry C. Westover, the Collector of Internal Revenue for the Sixth Collection District of California, at his office in the City of Los Angeles, State of California.

IX.

Admits the allegations contained in Paragraph IX thereof.

X.

Denies the allegations contained in Paragraph X thereof.

XI.

Denies the allegations contained in Paragraph XI thereof.

XII.

In answer to Paragraph XII thereof, defendant states that he is without knowledge or information sufficient to form a belief as to [18] the truth of the allegations therein contained.

Wherefore defendant prays that plaintiff take nothing by the Complaint herein, that the same be dismissed and that the defendant be hence dismissed with his costs in this behalf expended.

CHARLES H. CARR
United States Attorney
E. H. MITCHELL and
GEORGE M. BRYANT
Assistant U. S. Attorneys
EUGENE HARPOLE, Special Attorney
Bureau of Internal Revenue
By E. H. Mitchell
Attorneys for Defendant [19]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Apr. 9, 1946. [20]

[Title of District Court and Cause]

MEMORANDUM OPINION

This is an action wherein plaintiffs seek to recover certain excise taxes levied and collected by the Commissioner of Internal Revenue and involves the application of Sections 3406 (7), 3441-3442, 3440 and 3444 of the Internal Revenue Code, to the peculiar facts in the case at bar and presents primarily a question of fact as to whether the articles were rented or used by plaintiffs.

The plaintiffs operate a business of manufacturing decorative trimmings, made in part of rubber, for use principally in meat markets and are now generally used in place of parsley or some other natural green in decorating meat counters.

The plaintiffs' counsel in his able opening brief aptly states the questions involved as follows:

1. In determining plaintiffs' liability for excise tax under Section 3406 (a) (7), Internal Revenue Code, for the period from October 1, 1941, to October 31, 1942, did the Commissioner of Internal Revenue erroneously and illegally compute the tax on the basis that the plaintiffs "leased" a product manufactured by them, and that the tax, therefore, should me computed [26] upon the total gross revenue derived under such purported "lease"?
2. Did plaintiffs use a product manufactured by them in the operation of a business in which they were engaged, which would render them liable, to an excise tax on the fair market value of the articles so used?
3. Did plaintiffs include the excise tax in the price of the article with respect to which it was imposed, or did they collect the amount of the tax from any alleged vendee or vendees?

In areas where plaintiffs were not equipped to service the decorations, they sold their product outright but in districts where they maintained a service department, they did not sell their products but rented them to the trade. Such rentals were regularly services and soiled or damaged decorations were replaced with either new or renovated units.

Plaintiffs' contention in substance is that they were operating a decorative business and their products were used in the operation of said business and therefore come within the purview of Section 3444 of the Internal Revenue Code.

The evidence clearly establishes that the manufactured articles were rented and re-rented to the trade. While in a sense, they were rendering a service, at the same time the service consisted in the renting of the decorative units which they manufactured. This method was used in disposing of a portion of their output. Generally speaking any article that is rented requires a certain amount of servicing. The salesmen created a demand and instead of selling the decorative units rented them on a written rental agreement.

It naturally follows that the plaintiffs were not the users of the decorative units but were used by the trade to whom they were rented, therefore, these rentals were sals within the definition [27] thereof as provided in Section 3440 of the Internal Revenue Code.

I therefore am in accord with the findings of the Commissioner and direct that judgment be entered in favor of the defendant.

For the purpose of enabling defendant in preparing findings, I find that the Commissioner of Internal Revenue did not erroneously and illegally compute and collect the tax involved. I also find that the plaintiffs did not use the product manufactured by them. I further find that the plaintiffs did not include the excise tax in the articles rented by them.

Counsel for defendant is directed to submit proposed findings and judgment to me within ten days.

Dated: This 26 day of August, 1946.

BEN HARRISON

[Endorsed]: Filed Aug. 26, 1946. [28]

[Title of District Court and Cause]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above case came on regularly for trial on July 9, 1946, before the above-entitled Court, sitting without aid or intervention of a jury; the plaintiffs appearing by Richard K. Yeamans, Esquire, and the defendant appearing by James M. Carter, United States Attorney for the Southern District of California, E. H. Mitchell and George M. Bryant, Assistant United States Attorneys for said District, and Loren P. Oakes, Special Attorney for the Bureau of Internal Revenue; and the trial having proceeded, and oral and documentary evidence on behalf of plaintiffs having been submitted to the Court for consideration and decision and the Court on August 26, 1946, having rendered its memorandum opinion herein, and the Court from the foregoing evidence, makes the following Findings of Fact and Conclusions of Law: [42]

FINDINGS OF FACT

1.

At all times material herein, the plaintiffs were, and now are, copartners doing business under the firm name and style of McClintock Display Co., and have fully complied with the provisions of Sections 2466-2468 of the Civil Code of the State of California by filing a certificate of fictitious name with the County Clerk of the County of Los Angeles, State of California, and publishing the same as required by law.

2.

The taxes sued for herein were paid to defendant in his official capacity as Collector of Internal Revenue for

the Sixth Collection District of California and at all times material herein, the defendant was such Collector of Internal Revenue.

3.

At all times material herein the plaintiffs have been engaged in the business of manufacturing, selling and leasing certain rubber articles, which were used for decorative purposes in numerous meat markets, delicatessens and similar establishments which were plaintiffs' customers.

4.

On March 10, 1943, the Commissioner of Internal Revenue assessed against the plaintiffs the amounts of $22,507.23, $5,417.54 and $1,001.54 representing respectively tax, penalty and interest for the period October 1, 1941 through October 31, 1942, with respect to the Federal excise taxes on rubber articles imposed by Section 3406 (a) (7) of the Internal Revenue Code.

The net dollar amount of sales made by plaintiffs in each of the months herein in question and the amount of tax due and payable thereon at the close of each of said months is as follows: [43]

1941	Net Amount of Sales	Tax Due
October	$ 687.85	$ 62.53
November	507.33	46.12
December	561.82	51.07
1942		
January	293.06	26.64
February	194.91	17.72
March	86.17	7.83
April	72.12	6.56

May	45.00	4.09
June	162.04	14.73
July	254.39	23.13
August	2,936.37	266.94
September	4,820.15	438.20
October	2,089.02	189.91
	$12,710.23	$1,155.47

The tax in this case, due, other than as a result of sales of their product made by plaintiffs, was computed on the following figures and in the following manner and was collected as above set forth:

1941	Revenue	Tax as Computed
October	$ 16,699.78	$ 1,518.16
November	21,317.63	1,937.97
December	19,529.84	1,775.44
1942		
January	18,663.13	1,696.65
February	17,929.09	1,629.92
March	20,731.87	1,884.72
April	17,410.03	1,582.73
May	20,124.39	1,829.49
June	20,116.23	1,828.75
July	19,168.67	1,742.61
		[44]
August	17,575.37	1,597.76
September	14,163.29	1,287.57
October	11,439.91	1,039.99
Totals	$234,869.23	$21,351.76

5.

On or about December 24, 1943, the Commissioner of Internal Revenue abated the penalty of $5,417.54 mentioned in paragraph 4 hereof.

6.

On January 26, 1944, plaintiffs paid to Harry C. Westover, the Collector of Internal Revenue for the Sixth Collection District of California, $22,507.23 and $2,248.37, to cover respectively the foregoing tax and interest accrued at the time of payment.

7.

On October 13, 1944, plaintiffs filed with defendant their claim for refund on official form 843 within the time and in the manner provided by law and a correct copy of such claim is attached to the Complaint herein filed.

8.

On or about April 16, 1945, the Commissioner of Internal Revenue of the United States rejected and disallowed plaintiffs' said claim for refund.

9.

The plaintiffs have not in any way contested the above assessment by the Commissioner of Internal Revenue insofar as it relates to taxes based upon total amounts received by plaintiffs from outright sales of their above rubber products to others, but plaintiffs by the Complaint herein and their above refund claim have contested only that part of the foregoing assessment relating to taxes assessed by the Commissioner of Internal Revenue by reason of leases made by plaintiffs to their customers with respect to the above rubber products which plaintiffs had manufactured. [45]

10.

Plaintiffs' operations here in question occurred during the 13 months period commencing October 1, 1941. Plaintiffs dispute the assessment of the above taxes with respect to certain of their revenues which constituted rentals received from their customers after the customers had entered into rental agreements with plaintiffs. All of these rental revenues were derived from plaintiffs' use of a certain rental agreement, a typical copy of which was mentioned and explained in paragraph VI of the "Stipulation of Certain Facts" filed herein on May 10, 1946. No other or further written or printed instrument was used by plaintiffs in depriving the foregoing revenues, which totalled $234,869.23 for the above thirteen months period.

11.

A typical copy of the above rental agreement was attached to the foregoing stipulation as Exhibit A thereto. Such rental agreement reads as follows:

"Rental Agreement
McCLINTOCK DISPLAY COMPANY, Lessor
The Original Rubber Leaf Decoration
3044 Riverside Drive Phone Morningside 12113
C20396 Los Angeles, Calif., October 1, 1941
Lessee X SUPER MARKET
2000 Connecticut Ave.,
Newark, New Jersey District
[X] New Contract [ ] Picked Up
[ ] Added to [ ] Contract Cancelled
Rubber Leaf
20 – 18" clips installed
20 – 18" R.L. @ 7¢ – $1.40
Total Feet 30 Total 18" Units 20 [46]

		Amount
20 Total Holders Installed	)	:
	)	:
Rubber Leaf Exchanged	)	:
	)	:
Collected for 3 Month	)	:
	)	:
Rent Payable in Advance	)	:
	)	Total Collected 4:20

Rent from 10-1-41 to 1-1-42

Received Rent Smith Representative

Merchandise installed is the property of McClintock Display Co. This lease is revocable by McClintock Display Co. or lessee upon ten (10) days written notice.

Accepted by ..... Lessee

Form R-A Western Salesbook Co., 3049 1. 12th St., L. A., An. 10338 9751."

12.

The outright sales by plaintiffs of their above rubber decorative products were made in areas where they were not equipped to render service in connection with the same. In other areas plaintiffs made leases of the foregoing products to their customers and in connection with such leases plaintiffs rendered certain services, including the replacement of soiled or damaged decorations with either new or renovated units. These replacements occurred from time to time during the terms of the leases agreed upon with such customers and said replacements did not cause any change with respect to the rentals payable or

the rental terms agreed upon in the various rental agreements.

13.

The plaintiffs were the lessors and were not the users of the above rubber products which were leased to their customers by rental agreements such as the one hereinbefore quoted. Such products were used by plaintiffs' customers who were the lessees thereof. In no instances did the plaintiffs use the foregoing products which they manufactured. [47]

14.

The plaintiffs did not include the above excise taxes on the articles rented by them in the rental charges therefor, nor did they collect the amount of tax from their customers regardless of whether the customers were vendees or lessees.

From the foregoing Findings of Fact, the Court draws the following

CONCLUSIONS OF LAW

1.

The rental agreement quoted in finding 11 constituted a lease and the revenues derived from the use of this agreement constituted rentals.

2.

The leases which plaintiffs made as to their products by use of the above rental agreement constituted taxable sales of such products within the definition of "taxable

sale" contained in Section 3440 of the Internal Revenue Code.

3.

The Commissioner of Internal Revenue correctly computed and assessed against the plaintiffs the foregoing Federal excise taxes and interest thereon with respect to the above sales and rentals of the rubber products. The collection of the foregoing taxes and interest was legal and correct.

4.

Plaintiffs have not overpaid their Federal excise taxes (or interest thereon) with respect to the sales and rentals of the foregoing rubber products.

5.

Plaintiffs have failed to prove a claim or facts upon which the relief prayed for in the Complaint or any other relief can be granted and they are not entitled to any refund whatsoever of Federal excise taxes (or interest thereon) with respect to the foregoing sales [48] and rentals of rubber products or any other matters involved in the above-entitled suit.

Dated this 16 day of October, 1946.

BEN HARRISON
District Judge

[Endorsed]: Filed Oct. 16, 1946. [49]

In the District Court of the United States
Southern District of California

Central Division

No. 5114-~~O'C~~ BH

L. H. and FLORENCE L. McCINTOCK, dba McCLINTOCK DISPLAY CO., a copartnership,

Plaintiffs,

v.

HARRY C. WESTOVER, Collector of Internal Revenue,

Defendant.

JUDGMENT

The above case came on regularly for trial on the 9th day of July, 1946, before the above-entitled Court, sitting without aid or intervention of jury; the plaintiffs appearing by Richard K. Yeamans, Esquire, and the defendant appearing by James M. Carter, United States Attorney for the Southern District of California, E. H. Mitchell and George M. Bryant, Assistant United States Attorneys for said District, and Loren P. Oakes, Special Attorney for the Bureau of Internal Revenue; and the trial having proceeded, and oral and documentary evidence on behalf of the plaintiffs having been submitted to the Court for consideration and decision, and the Court, after being fully advised in the premises and after due deliberation, having rendered its memorandum opinion herein on August 26, 1946, and having filed its Findings of Fact and Conclusions of Law and order that Judgment be entered in [50] favor of the defendant in accordance with said Findings and Conclusions;

Now, Therefore, by virtue of the law and by reason of the Findings and other matters aforesaid, it is considered and ordered by the Court that the above-entitled action be dismissed and that defendant have judgment for and shall recover from plaintiffs the amount of defendant's costs, to be taxed by the Clerk of this Court in the sum of $10.00.

Judgment rendered this 16 day of October, 1946.

BEN HARRISON
District Judge

Approved as to form:

.....
Attorney for Plaintiffs

Judgment entered Oct. 16, 1946. Docketed Oct. 16, 1946. Book C. O. 40, page 243. Edmund L. Smith, Clerk: by Murray E. Wire, Deputy.

[Endorsed]: Lodged Oct. 8, 1946. Filed Oct. 16, 1946. [51]

[Title of District Court and Cause]

MOTION FOR NEW TRIAL

Come now the plaintiffs above named and respectfully move the Court to vacate the Judgment entered in this cause on the 16th day of October, 1946, and for a new trial, for amended findings of fact and conclusions of law and for the entry of a new judgment herein in favor of said plaintiffs, on the following grounds, and each of them:

Insufficiency of the evidence to justify the decision, in that:

1. The so-called "rental agreement" set forth in Finding of Fact number 11 is not, according to the evidence, a "lease" but is, in fact, merely an accounting form printed by Western Salesbook Co. and used by plaintiffs for [52] accounting purposes, or, in the alternative, that it was used from time to time for accounting purposes and was not used exclusively and at all times as a "lease". This is illustrated by the remark of the Court (Tr. p. 55-56) as well as by the fact that, to hold that on each occasion of its use a new "lease" was entered into would be to hold that plaintiffs entered into some 25,000 to 30,000 "leases" per year (Tr. p. 59). Further, said "rental agreement" is not a lease in that it cannot be ascertained therefrom the term of said alleged lease nor the particular property which is the subject thereof.

2. Finding of Fact number 13 must be construed as meaning that plaintiffs' customers enjoyed the exclusive "use" of plaintiffs' products. In other words, because plaintiffs' products were "used" by plaintiffs' customers, ipso facto, such products could not be and were not, "used" by plaintiffs. This Finding cannot be reconciled with Finding of Fact number 3, wherein it is found that "* * * plaintiffs have been engaged in the business of manufacturing, selling and leasing certain rubber articles * * *." A reading of these two findings justifies only a conclusion that plaintiffs engaged in operating a business which they "leased" taxable articles manufactured by them, but that they did not "use" the articles so manufactured in that business.

3. Conclusion of Law number 1 fails to support the Judgment entered herein since it specifies only that the particular "rental agreement quoted in Finding 11 constituted a lease and the revenues derived from the use of this agreement constituted rentals," and makes no reference to any other or further "leases" executed by plaintiffs. It should be noted that that particular rental agreement provided only for a total rental of $4.20 during a three month period, which is obviously not the basis of a tax of $21,351.76.

4. Conclusions of Law number 2 and number 3 are in conflict in that if the leases made by plaintiffs of their products by the use of the rental [53] agreement referred to in Conclusion of Law number 1 constitute taxable sales of such products within the definition of "taxable sale" contained in Section 3440 of the Internal Revenue Code, then, the amount of tax due on such taxable sales should have been computed as provided in Section 3441 (b) Internal Revenue Code, and the Commissioner of Internal Revenue was in error in determining that Section 3441 (c) (1) Internal Revenue Code directed that the tax in connection with the rubber articles found to have been leased by plaintiffs was to be measured by the total gross rentals derived from all of such leases. That said Section 3441 (c) (1) Internal Revenue Code does not provide a measure of the tax but merely provides when the tax, as measured by Section 3441 (b), shall be paid.

5. That the evidence shows (Tr. p. 19; 31) that plaintiffs' representatives determined which decorations were to

be exchanged and, further, that in the event decorations were soiled at any time, the soiled ones would be removed and different decorations placed in the case (Tr. p. 29; 30). The Court, therefore, erred in concluding that the so-called "rental agreement" constituted a "lease" within the purview of Section 3441 (c) (1) and regulations 46, Section 316.9, since the facts referred to clearly show that the so-called "lessee" did not have either a continuous right to the possession or use of a particular article, without interruption, since any of plaintiffs' products would do, nor is the right to possession, irrespective of what articles are installed, continuous for any definite period of time.

6. The Court erred in failing to conclude as a matter of law, from the evidence adduced, that plaintiffs used their product in the operation of a business in which they were engaged, and accordingly were subject to tax on the articles used by them as provided in Section 3444, Internal Revenue Code, and appropriate Regulations. [54]

7. The Court erred in failing to conclude as a matter of law, from the evidence adduced, that by their acts and conduct plaintiffs did not enter into a lease or leases within the purview of Section 3440 or Section 3441 (c) (1), Internal Revenue Code and appropriate Regulations.

8. The Court erred in failing to conclude as a matter of law, from the evidence adduced, that the manufacturer's sales tax due in this case should be based on the price at which the plaintiffs, as manufacturers, sold their prod-

uct, in the ordinary course of trade, to wit, .37945¢ each, and computed at ten per cent (10%) of said amount on the number of new units produced by plaintiffs during the period from October 1, 1941 to November 1, 1942, to wit, 82,170 of said units, irrespective of whether plaintiffs "used" or "leased" their product.

Plaintiffs do not file any affidavits herewith and base this motion on the pleadings and papers on file and on the minutes of the Court in this cause, and on this motion.

Dated, October 24, 1946.

JOHN T. RILEY and
RICHARD K. YEAMANS
By Richard K. Yeamans
Attorneys for Plaintiffs [55]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Oct. 24, 1946. [56]

[Minutes: Tuesday, December 24, 1946]

Present: The Honorable Ben Harrison, District Judge.

The motion of the plaintiffs for a new trial, filed Oct. 24, 1946, heretofore heard by the Court and ordered submitted, having been duly considered by the Court, it is now hereby ordered that the said motion for a new trial is denied. [67]

[Title of District Court and Cause]

NOTICE OF APPEAL

Notice Is Hereby Given That L. H. McClintock and Florence L. McClintock, copartners, doing business under the fictitious firm name and style of McClintock Display Company, plaintiffs above named, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from that certain judgment entered in the above entitled action on the 16th day of October, 1946.

Dated: February 14, 1947.

JOHN T. RILEY and
RICHARD K. YEAMANS
By Richard K. Yeamans
Attorneys for Plaintiffs

[Endorsed]: Filed & mld. copy to James M. Carter, Atty. for Deft. Feb. 18, 1947. [68]

[Title of District Court and Cause]

ORDER EXTENDING TIME TO FILE RECORD AND DOCKET CAUSE ON APPEAL

Good Cause Appearing Therefor, it is hereby ordered that the plaintiffs appellants may have to and including the 18th day of April, 1947 within which to file their record and docket the above-entitled cause on appeal to the Circuit Court of Appeals for the Ninth Circuit.

Dated: This 27 day of March, 1947.

BEN HARRISON
United States District Judge

[Endorsed]: Filed Mar. 27, 1947. [69]

[Title of District Court and Cause]

ORDER PERMITTING ORIGINALS TO BE SENT TO CIRCUIT COURT IN LIEU OF COPIES

Good cause being shown therefor, it is hereby ordered that all of the original exhibits in the above entitled case, pursuant to Rule 75(i) of the Federal Rules of Civil Procedure, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, in lieu of copies thereof, and said exhibits may, by direction and stipulation of the parties, become part of the record on appeal in the above entitled case.

Dated this 8 day of April, 1947.

BEN HARRISON
United States District Judge

[Endorsed]: Filed Apr. 8, 1947. [73]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 73 inclusive contain full, true and correct copies of Complaint for Refund of Excise Tax; Answer; Substitution of Attorneys; Copy of Notice of Transfer of Case; Minute Order Entered July 9, 1946; Memorandum Opinion; Proposed Findings of Fact and Conclusions of Law;

Objections to Proposed Findings of Fact and Conclusions of Law; Findings of Fact and Conclusions of Law; Judgment; Motion for New Trial; Defendant's Statement and Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for New Trial; Minute Order Entered November 4, 1946; Minute Order Entered December 24, 1946; Notice of Appeal; Order Extending Time to File Record and Docket Appeal; Stipulation Designating Record on Appeal and Order Permitting Originals to be Sent to Circuit Court in Lieu of Copies which, together with original plaintiffs' Exhibits Nos. 1 to 11, inclusive and copy of reporter's transcript of proceedings on July 9, 1946, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to $19.15 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 15 day of April, A. D. 1947.

(Seal) EDMUND L. SMITH,
Clerk,

By Theodore Hocke
Chief Deputy Clerk.

[Title of District Court and Cause]

Honorable Ben Harrison, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California
Tuesday, July 9, 1946

Appearances:

For the Plaintiffs: Messrs. Riley & Hall, by Richard K. Yeamans, Esq.

For the Defendant: Eugene Harpole, Esq., and Loren Oakes, Esq., Special Attorneys, Bureau of Internal Revenue.

Los Angeles, California, Tuesday, July 9, 1946. 10:00 A. M.

The Court: Are you ready to proceed, gentlemen?

Mr. Oakes: The defendant is ready.

Mr. Yeamans: The plaintiff is ready, your Honor.

The Court: As I understand, there is some testimony to be taken in this case.

Mr. Yeamans: Yes, we have two witnesses we would like to present on behalf of the plaintiff. We are prepared to present them. I wonder if the court would like a preliminary statement?

The Court: Perhaps a statement of what your witnesses would testify would enable the Government to stipulate they would so testify.

Mr. Yeamans: We would prefer to have the testimony of the witnesses.

The Court: Proceed then.

Mr. Yeamans: I will call Mr. McClintock.

EVERETT C. McCLINTOCK,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Everett C. McClintock. [3*]

Direct Examination

By Mr. Yeamans:

Q. What is your address, Mr. McClintock?

A. 485 East Highland Avenue, Sierra Madre.

Q. Are you related to the plaintiff, L. H. McClintock, in this case? A. Yes; a brother.

Q. When were you first employed by the McClintock Display Company? A. About 12 years ago.

Q. In what capacity? A. Salesman.

Mr. Oakes: At this point the Government would like to enter an objection to the introduction of testimony on behalf of the plaintiff inasmuch as the Government submits that Section 3443 (b) of the Internal Revenue Code, and Section 318.9 of the Treasury Regulations 46, provide that no over payment shall be credited or refunded in pursuance of a court decision or otherwise unless the person who paid the taxes is in accordance with regulations prescribed by the Commissioner with the approval of the Secretary.

1. That he has not included the tax in the price of the articles with respect to which it was imposed or collected the amount of tax from the vendee; or,

2. That he has repaid the amount of the tax to the [4] ultimate purchaser of the article, or unless he files with

*Page number appearing at top of page of original Reporter's Transcript.

(Testimony of Everett C. McClintock)

the Commissioner written consent of such ultimate purchaser to the allowance of the credit or refund.

What I have just read is a verbatim quotation from that section of the Internal Revenue Code.

Now, I wish to concede for the purpose of the record that both the refund claim and the complaint herein do make an assertion that there was no passing on of the tax; but it is the Government's contention that the mere assertion of that conclusion in the refund claim and the complaint do not satisfy the regulations which say that that shall be established in a sworn statement, and unless there is an establishing of that point in a sworn statement, namely, the refund claim, then under the statute and regulations there is no jurisdiction in the court to grant a refund herein. And I further submit that there is no statement of a cause of action in the filing of this complaint.

The Court: Why has the Government waited until this late time to raise that point?

Mr. Oakes: Well, it was mentioned in the pre-trial brief, the pertinent section of the Code and the pertinent section of the Regulations. I did suggest at one time to opposing counsel that they might start over with a refund claim which might be adequate. Possibly counsel thinks that his refund claim is adequate but for the purpose of the [5] record I do want the Government's position to be shown at the outset of the trial.

The Court: I will hear the evidence in the case and then you gentlemen may submit briefs.

I might say at this point I gather from an examination of the file it is the plaintiff's contention, primarily, that

(Testimony of Everett C. McClintock)

they were conducting a service organization and that their rubber decorations were simply a part of that business. Is that not true?

Mr. Yeamans: That is correct, your Honor.

The Court: I thought we would get the facts and then we will determine the law. I am not going to pass on your objection at this stage of the proceeding. If necessary we will continue the hearing to go into that question. As I say, I am going to hear the facts now and then counsel may submit their briefs.

Mr. Yeamans: I should say at this point, your Honor, that we are prepared to prove at this time that the amount of the tax, if any, was not included in our service charge and passed on.

The Court: I know, but he raises the question that you have not furnished the Commissioner with that evidence. In other words, his point is that you are simply asserting to that fact and that is insufficient; there should have been a sworn statement of some kind furnished to the Commissioner. [6]

Mr. Yeamans: I appreciate his point, your Honor. I was merely stating.

The Court: But the fact that you now intend to prove your claim, if the claim was insufficient your case would fall.

Mr. Yeamans: And if the claim is sufficient then the proof at this time is in order.

The Court: Yes.

Mr. Oakes: Your Honor, I am perfectly agreeable in the interest of expediting matters that the full testimony go in.

(Testimony of Everett C. McClintock)

The Court: But you want the record to show your objection?

Mr. Oakes: Yes.

The Court: The objection is overruled and we will proceed.

Mr. Oakes: And may I also have it understood, to avoid repetition, that that objection will continue throughout the hearing as he continues to bring out further evidence.

The Court: You have no objection to that, have you, counsel?

Mr. Yeamans: No.

The Court: It will be so understood.

Mr. Yeamans: Could we have the last question and answer read?

(Question and answer read.)

Q. By Mr. Yeamans: How long did you remain a salesman, Mr. McClintock? [7]

A. About two years.

Q. And what capacity did you assume at that time?

A. At that time, at the end of two years, I was made Pacific Coast sales manager.

Q. And how long did you remain Pacific Coast sales manager? A. About three years.

Q. And what other capacity did you assume then?

A. As general sales manager.

Q. And you have remained since then as general sales manager? A. Yes.

Q. And that would be about what year, please?

A. Since about 1938.

(Testimony of Everett C. McClintock)

Q. Mr. McClintock, approximately in what year was the partnership of L. H. and Florence McClintock formed?

The Court: There is no issue as to that, is there?

Mr. Yeamans: No, I believe not. I merely wanted to be sure we had the background.

The Court: Let us get down to the facts.

Mr. Yeamans: All right, sir.

Q. Mr. McClintock, will you state for us what steps your salesmen take in going into a market in connection with this service?

A. Yes. Our salesmen would enter a market and note the [8] presence or absence of decorations in the case and he would then state his business to the proprietor or operator of the market and explain in detail our service, which consists of furnishing the rubber leaf decorations for his cases. And going into further detail, he would explain that over the period the rubber leaf would receive frequent service and it would be reconditioned and cleaned, which would make his cases not only more sanitary but would make his merchandise more sales appealing; that it would be economical for him, save him time, and also that our service not only consisted of placing the decorations in the cases, but also that our men were trained in cutting and plattering and displaying the meat, which is very often a great help to the various operators.

Q. And it would be true, would it not, that in many parts of the East there are no fresh greens at certain times of the year?

A. Yes, in the extreme East or even Middle West I would say about eight months out of the year there is no fresh decoration available.

(Testimony of Everett C. McClintock)

Q. Let us assume at this point that the butcher to whom your man is talking—

Mr. Yeamans: And I say at this point, your Honor, we have arrived at a character called John X to be used as our customer. And the stipulation of certain facts will indicate what the first service would have been. So, for the purpose [9] of illustrating that, let us assume that the butcher has indicated his desire to avail himself of this service, what steps would the salesman take at that point?

A. Well, the first thing that he has to do is make a survey and a diagram of the case to determine the proper type and number of metal holders that would be required to properly set up the case with the decorations.

Q. And at this point I will ask you to examine this object and tell me whether or not that is one of the holders which is used in displaying the rubber leaf?

A. Yes; this is one type that is used in both markets and delicatessens.

Mr. Yeamans: We offer this in evidence as Plaintiff's exhibit first in order.

The Court: It will be admitted.

(The article referred to was marked as Plaintiff's Exhibit No. 1 and was received in evidence.)

Q. By Mr. Yeamans: I will ask you to examine this and tell me whether or not that is a type of metal holder used to display the rubber leaf? A. Yes, it is.

Mr. Yeamans: We offer this as Plaintiff's exhibit 2.

The Court: It will be received.

(The metal holder referred to was marked as Plaintiff's Exhibit No. 2, and was received into evidence.) [10]

(Testimony of Everett C. McClintock)

Q. By Mr. Yeamans: After the salesman has prepared the diagram showing what type of holders are necessary, what steps does he then take?

A. Well, the first thing he has to do is to take the trays of meat out of the case and quite often has to clean the inside of the glass case so that the decoration will appear properly. Then he will place the holders in the case. As a rule, a great many of them will fit on the front of the meat racks or quite often he has to fix some special contrivance there to hold the holders in place along the front of the glass because the cases vary so greatly in angle.

Q. You mean the angle of the glass in the front of the case?

A. Yes; some will come up straight, and some will slant back quite sharply, so that it does take a trained man to know just what to do in those particular cases.

Q. Well, he will place the holders in the right angles, in the proper places, and then insert the decorations in those holders? A. Yes.

Q. Now, at this point I will ask you to examine this article and tell me what it is, please?

A. That is our rubber leaf decoration that is used for decorative purposes.

Q. And is that a new decoration or a used one? [11]

A. This is a new one here.

Mr. Yeamans: We offer this in evidence as Plaintiff's Exhibit 3.

The Court: It will be received.

(The article referred to was marked as Plaintiff's Exhibit No. 3, and was received in evidence.)

(Testimony of Everett C. McClintock)

Q. By Mr. Yeamans: You have indicated that when he has his holders installed he then installs the decoration in each of the holders?

A. Yes, along the front of the case.

Q. What further steps does he take?

A. Then he replaces the platters, unless he can suggest to the operator or the proprietor that the merchandise can be greatly improved in the way of sales appeal by re-plattering or re-cutting and placed differently in the cases, which our men are trained to do. And quite often it will take our men, oh,—I have known as much as several hours to go over all the platters and re-platter the meat and make it more attractive looking in order to get the full value from the decoration and the display. Then he will place the trays back into the case and insert the rubber parsley between each platter, which makes the color contrast of green with the red, and makes it much more appealing to the customer.

Q. And I show you also what purports to be a picture of a display showing the manner in which the rubber leaf— [12]

The Court: Isn't there an exhibit in the stipulation that covers that?

Mr. Yeamans: It does not show this.

The Court: I know, but the court understands from reading the stipulation that these are decorations to set off the meat. It is an imitation of fresh greenery and it is placed in these markets, as the witness has stated, to aid in the sale of the butcher's product and that it is an inexpensive item; that it is a simple method for the butcher.

(Testimony of Everett C. McClintock)

Mr. Yeamans: That is correct, your Honor. I think your statement clarifies it sufficiently so that there is no need for further testimony in that regard.

Q. When the salesman has completed the display what steps does he then take—that is, the installation of it?

A. Well, the next thing he will do is make out the ticket showing the amount of rubber leaf installed and the number of holders installed and the price charged and the amount collected.

The Court: There is a sample of such ticket in the agreement.

Mr. Yeamans: We have several others we would like to bring out, your Honor, that is the purpose of this testimony, to illustrate the further use of that ticket.

It is at this point that I would like to offer the one which is attached as an exhibit, Exhibit A to the stipulation. [13]

The Court: Isn't there a stipulation to that effect?

Mr. Yeamans: That that ticket was used and that—

The Court: Just a moment. In connection with your rubber leaf business during the period from October 1st to October 31st, 1942, and that is the period that is covered here.

Mr. Yeamans: Yes, your Honor.

The Court: The plaintiffs used only the printed form of copy which is attached hereto and made a part hereof and marked Exhibit A. Exhibit A is your agreement with the X-Super Market as a sample.

Mr. Yeamans: Yes, that is correct, your Honor. And it is at this point that I propose to ask the witness whether or not this ticket would have been filled out in this fashion at the time of the completion of the initial display.

(Testimony of Everett C. McClintock)

Mr. Oakes: I do not believe there has been any showing of materiality with respect to that question or the entire line of interrogation.

The Court: As a matter of fact, this witness has been testifying to something that is in a sense thin air as to his method of doing business, which in sum and substance is a salesman's job.

Mr. Yeamans: We are interested in establishing, your Honor, and I think entitled to show that we used this product in the operation of a business in which we were engaged. [14]

The Court: I understand the purpose of it. What I am interested in is you are asking now about the different kinds of tickets when you have already stipulated that the Exhibit A here was the kind that was used during that period.

Mr. Yeamans: It says that particular form illustrates how it would have been filled in in the case of a new customer. Testimony will be offered at the trial which will illustrate other uses of this form under varying circumstances in connection with the conduct of the Plaintiff's business.

The Court: Of this form, you say?

Mr. Yeamans: Yes, your Honor.

The Court: All right, proceed.

Mr. Yeamans: And I merely at this point want to—

The Court: Proceed, counsel. I will tell you like I told an attorney the other day, it is easier to listen to the witness than to argument.

Mr. Yeamans: May I see the original file? Or may it be stipulated that the stipulation of certain facts is offered in evidence in its entirety?

(Testimony of Everett C. McClintock)

The Court: The stipulation of facts is binding upon both counsel—you each signed the stipulation.

Mr. Yeamans: That is correct, but I offer it in evidence in order that there is no question about it.

The Court: All right, it will be considered in evidence.

Mr. Oakes: No objection to the offer. [15]

(The document referred to was marked as Plaintiff's Exhibit No. 4, and was received in evidence.)

[PLAINTIFFS' EXHIBIT NO. 4]

In the District Court of the United States, Southern District of California, Central Division

L. H. and Florence L. McClintock, d.b.a. McClintock Display Co., a copartnership, Plaintiffs, v. Harry C. Westover, Collector of Internal Revenue, Defendant.

No. 5114 O'C-Civil

STIPULATION OF CERTAIN FACTS

It Is Hereby Stipulated and Agreed, by and between counsel for L. H. and Florence L. McClintock, d.b.a. McClintock Display Co., a copartnership, plaintiffs, and Harry C. Westover, Collector of Internal Revenue for the Sixth District of the State of California, defendant, that, for the purposes of the above entitled action, and all proceedings therein, the following facts shall be deemed to be true and correct:

I.

That at all times mentioned in the Complaint for Refund of Excise Tax, (hereinafter referred to as the Complaint) the plaintiffs were, and now are, copartners doing

(Plaintiffs' Exhibit No. 4)

business under the firm name and style of McClintock Display Co., and have fully complied with the provisions of Sections 2466-2468 of the Civil Code of the State of California by filing a certificate of fictitious name with the County Clerk of the County of Los Angeles, State of California, and publishing the same as required by law.

II.

That the copy of plaintiffs' claim for refund which is attached to the Complaint herein and marke*t* Exhibit "A" is a true and correct copy of the claim for refund filed by plaintiffs with defendant on the 13th day of October, 1944, and that said claim for refund was filed on official form 843, within the time and in the manner provided by law.

III.

That during the period from October 1, 1941 to October 31, 1942, plaintiffs sold 1279 new eighteen (18) inch units and 32,217 used eighteen (18) inch units of their product at an average selling price per unit as hereinafter shown, to meat and vegetable dealers, said sales being in the net sum of $12,710.23. That the sales were as follows:

	No. of Units	Average Selling Price Per Unit	Gross Receipts
New	1,279		
Used	32,217		
Total	33,496	.37945¢	$12,710.23

(Plaintiffs' Exhibit No. 4)

IV.

That the net dollar amount of sales, as set forth in Paragraph III hereof, was made by plaintiffs in each of the following months, as shown, and the amount of tax due and payable thereon as of the close of each month, is as shown:

1941	Net Amount of Sales	Tax Due
October	$ 687.85	$ 62.53
November	507.33	46.12
December	561.82	51.07
1942		
January	293.06	26.64
February	194.91	17.72
March	86.17	7.83
April	72.12	6.56
May	45.00	4.09
1942	Net Amount of Sales	Tax Due
June	$ 162.04	$ 14.73
July	254.39	23.13
August	2,936.37	266.94
September	4,820.15	438.20
October	2,089.02	189.91
	$12,710.23	$1,155.47

V.

That during the period from October 1, 1941 to October 31, 1942 plaintiffs' inventories (new and used units on hand, and used units on display), production of new units, units washed and brightened and new and used units sold to others, were as follows (all figures being eighteen (18) inch units).

(Plaintiffs' Exhibit No. 4)

	Inventory First of Each Month		Number of Units on Rental First of Each Month	Number of New Units Manufactured During Each Month	Number of Used Units Washed and Brightened Each Month	Number of Units Sold to Others Each Month		Un D car
	New Units	Used Units				New	Used	
41								
t.	538	160,609	302,949	21,736	71,421	937	1,063	10,8
ov	1,228	173,874	304,657	17,569	78,161	122	1,303	8,8
c	4,160	171,409	307,074	11,594	98,471	69	1,779	2,6
42								
n	26,286	130,168	310,762	16,512	79,291		936	2
b	43,582	157,380	293,665	5,846	90,608		465	1
ar.	40,182	169,969	282,078	345	90,386		227	1
or	40,608	171,811	287,992	1,727	78,324	40	71	3
ay	34,152	168,086	292,516	171	49,841	24	85	1,8
n	32,278	150,592	294,577	6,670	71,453		637	1,9
l	41,080	136,766	295,844		68,139		762	5,4
ig	32,102	135,106	281,998		66,903	57	7,721	3,5
p	29,522	139,216	269,227		47,170		11,400	1,4
t	28,988	138,584	260,455		67,029	30	5,768	3,6
ov	27,030	134,909	252,327					
				82,170	957,197	1,279	32,217	41,2

VI.

That in connection with their rubber leaf business during the period from October 1, 1941 to October 31, 1942, plaintiffs used only the printed form, a copy of which is attached hereto, made a part hereof, and marke*t* Exhibit A. That particular form illustrates how it would have been filled in in the case of a new customer. Testimony will be offered at the trial which will illustrate other uses

(Plaintiffs' Exhibit No. 4)

of this form under varying circumstances in connection with the conduct of plaintiffs' business. That no other or further written or printed instrument was used by plaintiffs in connection with their above business during the period from October 1, 1941 to October 31, 1942. The above form was used by plaintiffs in connection with deriving the revenues listed in VII hereof.

VII.

That the tax asserted to be due in this case, other than as a result of sales of their product made by plaintiffs, was computed by the Deputy Collector on the following figures and in the following manner.

1941	Gross Revenue	Tax Computed by Deputy Collector
October	$ 16,699.78	$ 1,518.16
November	21,317.63	1,937.97
December	19,529.84	1,775.44
1942		
January	18,663.13	1,696.65
February	17,929.09	1,629.92
March	20,731.87	1,884.72
April	17,410.03	1,582.73
May	20,124.39	1,829.49
June	20,116.23	1,828.75
July	19,168.67	1,742.61
August	17,575.37	1,597.76
September	14,163.29	1,287.57
October	11,439.91	1,039.99
Totals	$234,869.23	$21,351.76

(Plaintiffs' Exhibit No. 4)

That the term "Gross Revenue" as used in this paragraph means the gross revenue derived by plaintiffs from the operation of their business, after making allowance only for refunds either made in cash or allowed as a credit.

VIII.

That Section 3406 (a) (7) of the Internal Revenue Code became effective October 1, 1941. By reason of Section 611 of the Revenue Act of 1942, the taxes under Section 3406 (a) (7) of the Internal Revenue Code, do not apply to transactions after November 1, 1942.

IX.

That this stipulation is solely for the purposes of establishing the truth of the facts herein contained, and shall not be construed to be a waiver by either of the parties to it of their right to make objection at any time to the materiality or relevancy of said facts to any of the matters in issue.

RILEY AND HALL
By Richard K. Yeamans
Attorneys for L. H. and Florence L. McClintock, d.b.a. McClintock Display Co., a copartnership, Plaintiffs.

CHARLES H. CARR
United States Attorney
E. H. MITCHELL and
GEORGE M. BRYANT
Asst. U. S. Attorneys
EUGENE HARPOLE, Special Attorney
Bureau of Internal Revenue
By Eugene Harpole
Attorneys for Defendant, Harry C. Westover, Collector of Internal Revenue.

(Plaintiffs' Exhibit No. 4)

"EXHIBIT A"

Rental Agreement

McCLINTOCK DISPLAY COMPANY, Lessor

The Original Rubber Leaf Decoration

3044 Riverside Drive Phone MOrningside 12113

C20398 Los Angeles, Calif., October 1 1941

Lessee X SUPER MARKET

2000 Connecticut Ave.,

Newark, New Jersey District

[X] New Contract [ ] Picked Up

[ ] Added To [ ] Contract Canceled

Rubber Leaf

20 – 18" clips installed

20 – 18" R.L. @ 7¢ – $1.40

Total Feet 30 Total 18" Units 20

20 Total Holders Installed Amount

Rubber Leaf Exchanged

Collected for 3 months

Rent Payable in Advance

Total Collected 4 20

Rent from 10-1-41 to 1-1-42

Received Rent Smith Representative

Merchandise installed is the property of McClintock Display Co. This lease is revocable by McClintock Display Co. or lessee upon ten (10) days written notice.

Accepted by John X Lessee

(Plaintiffs' Exhibit No. 4)

Form R-A Western Salesbook Co., 3049 E. 12th St., L. A., An. 1-0338 9751

[Endorsed]: Filed May 10, 1946. Edmund L. Smith, Clerk; by E. M. Enstrom, Jr., Deputy Clerk.

No. 5114-BH. McClintock vs. Westover. Plfs. Exhibit No. 4. Filed Jul. 9, 1946. Edmund L. Smith, Clerk; by MEW, Deputy Clerk.

No. 11587. United States Circuit Court of Appeals for the Ninth Circuit. Filed Apr. 19, 1947. Paul P. O'Brien, Clerk.

Q. By Mr. Yeamans: And I would like to ask the witness to state whether or not under the circumstances that we have been discussing in this particular case, does Exhibit A, attached to Plaintiff's Exhibit 4, represent the manner in which the contract for the X-Super Market would have been filled out as a new contract?

A. Yes; it shows right here.

Q. Would you please examine it and explain what the various entries mean?

A. There are places here for the salesmen—service men to mark. This is marked this way, which shows it is a new account and these others show—that is the reason these various spaces are here. I think Mr. Yeamans wants to bring out—

The Court: In other words, if it was a new contract it would be marked here with an X?

The Witness: Yes, sir.

The Court: And if there was something added to it that would be indicated there?

(Testimony of Everett C. McClintock)

The Witness: Yes, sir.

The Court: And if it was picked up—what do you mean by that? When they become soiled?

The Witness: No. If the merchant decided he didn't need [16] quite as much as he had and he wanted to discontinue part of his case, part of his display, which we have had happen a great many times, for some reason or other—maybe his business—

The Court: It reduced the number that he had on hand?

The Witness: Reduced the number of pieces that he had on hand, yes.

The Court: Then would you give him credit for it?

The Witness: We would give him credit for it, yes.

The Court: On what basis?

Mr. Yeamans: We have tickets illustrating that, your Honor.

The Court: I want to get the picture here.

The Witness: Well, that happens in various ways, your Honor. Quite often an operator will call a salesman in the various cities and state that he is discontinuing a portion of his case or it may come up this way. He may change his type of cases or he may change his type of display and as a rule the serviceman will visit the market and pick up any surplus.

The Court: Now, as I understand in this case you placed these decorations in stores on what you call a rental agreement, or whatever Exhibit A is designated?

The Witness: Yes, sir.

(Testimony of Everett C. McClintock)

Mr. Yeamans: It is so entitled, your Honor.

The Court: And would that rental agreement continue in [17] force until it was cancelled at so much a year?

The Witness: Well, as a rule in the East we base our service on a 90-day period and it is so explained to the operator, market operator at that time. The serviceman will state that he will return at periodic intervals of 90 days and, oh, pardon me, sixty days, and at that time—now, just as a good example, perhaps at the time the decoration has been installed the operator will take a little surplus, not knowing exactly just how much he is going to use, so on the next visit, the regular service call, the operator decides he does not need that surplus, so our serviceman will pick that up and issue a credit.

The Court: I want to get the picture of your method of doing business. For instance, you go in and you sell a man on your idea.

The Witness: That is right.

The Court: That is the object of your salesman going there. Then you have what you call a rental agreement. For what period of time does that rental agreement extend?

The Witness: That does not cover any certain time. An operator can call up this afternoon and—

The Court: Let us take this so-called Exhibit A. The charge there was for a period of three months, was it not?

The Witness: That is right.

The Court: So that states definitely the term of the agreement. Now, if in those three months some of these [18] decorations become soiled you replace them, is that not true?

(Testimony of Everett C. McClintock)

The Witness: Yes; here is something that happens quite often as an example.

The Court: Yon can answer that question. As I understand it, you keep their cases supplied with fresh decorations?

The Witness: That is right.

The Court: And if they become soiled or anything happens to them, you replace them with new material and take the old material back to your place of business and restore it?

The Witness: That is right; or replace them with new. Quite often we have to replace them with new rubber leaf.

The Court: So that is a continual process?

The Witness: Yes sir.

The Court: In other words, you rent these and render a service with them?

The Witness: Yes. I would like to explain, if you don't mind, how—what is connected with the service in some way if you don't mind. We are called in in so many different and various cases. Sometimes a serviceman will have to call back on a market as many as three or four times in a 60 or 90-day period to perform a service which is covered by the periodic service charge. The merchant absolutely does not have to pay extra at all.

The Court: That is part of the service that you furnish when you rent these decorations? [19]

The Witness: That is right. That is explained to the operator at the time.

The Court: And the salesmen work on straight commission or part salary and part commission?

(Testimony of Everett C. McClintock)

The Witness: At the time of this it was straight salary.

The Court: Where does that differ from any other salesman who sells an object that requires servicing?

The Witness: Well, the fact that our men have to be trained in knowing how to properly display our merchandise. Not only that but in the proper displaying of meats. Now, along about that time, why, the displaying of meats was not given a great deal of attention.

The Court: I am simply asking where it is different from an ordinary salesman's job. Many years ago I was a salesman for a typewriter company and I had to go into the shop and learn how to adjust typewriters and when I sold a person a machine I was working on a salary and even then I would have to go back and adjust it and render whatever service was necessary to the proper operation of that machine.

Now, I cannot see any difference in the service you are rendering and that which I rendered.

The Witness: Well, we have had occasion to compare our business to a linen laundry service, if that might be of any help in explaining it. A linen laundry supply company is not a rental organization. They are just a service organization. [20] They not only supply the linen, the gowns and aprons and so forth, but they keep them up, repair them and furnish new and they are just simply charged for the service that is rendered. They don't give you—furnish the gowns and receive a rental just for giving you the gowns and you take care of them. That is what has built our business, is the service connected with it, and not just the decorations alone. It has been proven

(Testimony of Everett C. McClintock)

to these, especially the large organizations, that it has been a real lifesaver to them because their men at the prices they are paid especially today, cannot devote their time to monkeying around with decorations and the fact that our men come in and service very frequently the decorations or change their displays around for them or are called out when they change meat cases and so many various things is what has built our business. It has been the service and not the fact we went out and rented so many pieces.

The Court: You may proceed.

Mr. Yeamans: Thank you, your Honor, for bringing that out.

Q. Calling your attention to Exhibit A, which is attached to Plaintiff's Exhibit 4, would you refer to that and tell me how many units of rubber leaf and how many clips were installed and what indication was made as to a service charge?

A. Well, in this particular case there was 20 18-inch pieces of rubber leaf decoration installed and 20 18-inch [21] metal holders.

Mr. Oakes: I move to strike any testimony that would in any way modify or vary the—

The Court: He is not attempting to modify anything. He is just explaining it.

Mr. Yeamans: I am merely asking him to explain what is there.

Mr. Oakes: As a matter of fact, I think he is even contradicting the document. The document says it is a rental agreement and it says that the title remains in McClintock Company, and yet this witness would en-

(Testimony of Everett C. McClintock)

deavor to contradict that rental terminology by saying that it is service rather than rental and to the extent there is a contradiction I do not think his testimony should be permitted.

Mr. Yeamans: I believe, your Honor, that we are entitled to show, and that is what we are endeavoring to do, exactly what this little ticket was used for. The authorities are clear that the mere fact that it is called one thing does not of necessity establish it as being of that character; and that we may go ahead and show how we used it and how it was treated by the parties concerned and that is what we are proposing to do.

Mr. Oakes: We have been hearing testimony as to how the business operates, but when he characterizes what the document calls for— [22]

The Court: That is what it calls for in so many figures.

Mr. Oakes: It speaks for itself.

The Court: Yes, it speaks for itself.

Mr. Oakes: He can give his evidence as to how they operate, but I think is it contradicting the document to say it calls for service charges rather than rent.

The Witness: Well, we have always—in fact, we have never really paid any attention to this ticket. It seemed to be just a form. It happened to start years ago and we just continued using it. It just happened to cover our particular business, but I think that any number of operators would testify that we do and always have called it a service, and that it is a service.

Mr. Oakes: I move that be stricken on the ground of hearsay.

(Testimony of Everett C. McClintock)

The Court: Well, it is a conclusion too, as far as that is concerned.

Mr. Yeamans: We are simply offering to show, your Honor, the manner in which this ticket has been used in the business as indicating the real purport and intent of the thing.

The Court: Counsel, is there anything you can add to the witness' testimony that will make it any clearer to the court? The witness has already told me he took these decorations and placed them in the various stores; they hired men [23] to not only sell the butcher shops on the idea, but that they kept men to service the decorations; that when they needed replacing they replaced them.

Mr. Yeamans: I think that the use of this ticket—may I say to your Honor that if I understand the Government's position it is that this form of sales ticket represents a lease and it is based on that that the Government is urging a tax in a very, very sizeable amount. Our position is that this instrument does not represent a lease; that it is merely an accounting slip, and I was simply going to prove the manner in which it was used in the business and the circumstances which gave rise to the—

The Court: Now, counsel, the conclusion of the witness as to what he considered it and all that is a bare conclusion. He has testified as to the manner in which they did business and how they used that slip. Now, what conclusions are to be drawn from that is for the court.

Mr. Yeamans: That is the function of the court, your Honor, but I would like to be able to show different uses of the slip.

(Testimony of Everett C. McClintock)

The Court: Strictly speaking, there has been hardly a word that this witness has testified to that is admissible in evidence, because he has told what the salesmen would do, which would be mere hearsay, and there has been nothing specific about it. I permitted it to go in so as to get the [24] picture, but I am not going to stand that abuse any more. I have tried to make it easy for you, and this witness, I think, has explained the way that they were doing business. He could talk here all day but what more could he tell me other than what he has already told me?

Mr. Yeamans: Except to identify the other tickets and give some further detail.

The Court: Then get to the other tickets.

Mr. Yeamans: Do I understand you will not admit the other tickets?

The Court: No, I have not said that. You have not offered them yet.

Mr. Yeamans: No, I haven't. I should also add, your Honor, that I may be proceeding on the wrong track. I had thought instead of bringing in specific tickets that counsel and I had understood, as indicated by our stipulation, that we would use this as a basis and proceed to make other illustrations thereby.

The Court: Counsel, if you will read your stipulation you will find you stipulated that was a ticket that was used during the period.

Mr. Yeamans: That is correct. And the only part of the stipulation to which I am referring, or the other part, is that testimony will be offered which will illustrate other uses of the form under varying conditions. [25]

(Testimony of Everett C. McClintock)

The Court: Other uses of the form, but you used that form?

Mr. Yeamans: That is correct, yes, but we used it in more than one circumstance.

The Court: Well, he has testified he used it in four different circumstances.

Mr. Yeamans: I think it, perhaps, was prepared for more than that, your Honor.

The Court: Well, just proceed, counsel.

Q. By Mr. Yeamans: Mr. McClintock, if it is assumed that the salesman, John X, who is referred to on the ticket, attached to the stipulation of facts, receives a call from the operator stating that he desires to extend the service to the delicatessen portion of the market, what steps would the salesman then take?

A. Well, he would visit the market as soon as possible and go through more or less the same procedure he did in decorating the meat case. He would have to make his diagrams and determine the holders, and then in a good many instances he would find that our regular stock holders would not be suitable for the equipment of that particular case. He would have to send the diagram in to the factory, which we make up—we make up the special metal holders and as a rule ship them back to him by express so he will have them as soon as possible for that particular job. [26]

Q. And when he completes the installation does he again make out a ticket? A. Yes.

Q. I will ask you to examine this ticket and tell me whether or not it is the type of ticket that the salesman

(Testimony of Everett C. McClintock)

would have made out on the completion of that particular job?

A. That is correct. This particular ticket shows he has added to the amount of rubber leaf already in that store.

Q. And it shows the quantities which have been added?

A. Yes.

Q. And the number of holders which have been added?

A. Yes.

Q. Does it show the amount of the additional service charge?

A. Yes, it does. It shows that he installed 32½ pieces there at seven cents.

Mr. Oakes: I move to strike that. We are again going into conclusions about service charges based on this document.

The Court: Where is there anything on this ticket that shows a service charge? Let me see the ticket. Where is there anything that sets forth any service charge?

The Witness: This shows here.

The Court: Added to.

The Witness: He has been called back to the market.

The Court: And he put in additional decorations? [27]

The Witness: He added this many units.

The Court: That many units?

The Witness: And collected for it.

The Court: Collected for it?

The Witness: Yes. He also gets the signature of the operator where it was installed and the serviceman signs it and the ticket acts as a receipt.

(Testimony of Everett C. McClintock)

Q. By Mr. Yeamans: That is a receipt to the operator that the serviceman got this much money?

A. Yes, and that is sent into the office.

Mr. Yeamans: We offer this as Plaintiff's Exhibit next in order.

Mr. Oakes: Before that is submitted, I want an understanding as to whether the court is receiving this evidence with respect to service charges.

The Court: I am receiving it for what it shows on the face of it, counsel.

Mr. Oakes: But the characterization by the witness of it being service charges is a conclusion. That is what our lawsuit is about, whether we are renting here or something else.

The Court: And that is what the court is here for, to determine whether this is set up as a rental setup or whether it is a service organization. The fact that he says it is a service is a conclusion. That is something that I am going to [28] have to determine by the method of doing business. His constantly referring to it as a service charge does not of necessity make it a service, and the fact that this witness so refers to it does not make it so. That is a mere conclusion. I have looked upon his testimony in that respect.

Mr. Oakes: If it is considered as a conclusion, that is my point.

The Court: It is a conclusion. That is something I am going to have to determine. He testified he is running a service organization. That is his contention as I view it.

(Testimony of Everett C. McClintock)

Mr. Oakes: Well, that understanding is agreeable. I will object to that on its immateriality.

The Court: Objection overruled.

(The document referred to was marked as Plaintiff's Exhibit No. 5, and was received in evidence.)

[PLAINTIFFS' EXHIBIT NO. 5]

Rental Agreement

McCLINTOCK DISPLAY COMPANY, Lessor

The Original Rubber Leaf Decoration

3044 Riverside Drive Phone MOrningside 12113

A22330 Los Angeles, Calif., Oct 3 1941

Lessee X Super Market

2000 Connecticut Ave

Newark New Jersey District

[ ] New Contract [ ] Picked Up

[X] Added To [ ] Contract Cancelled

Rubber Leaf

4 Pcs. 9″ R.L. – 2

15 " 15″ R.L. – 12½

18 " 18″ R.L. – 18

@ 7

Total Feet..... Total 18″ Units 32½

4 – A 3 Amount

15 – D 2 Total Holders Installed 2 27

Collected for 3 months

Rent Payable in Advance Total Collected 6 58

(Plaintiffs' Exhibit No. 5)

Rent from 10/3/41 to 1/1/42

Received Rent Smith Representative

Merchandise installed is the property of McClintock Display Co. This lease is revocable by McClintock Display Co. or lessee upon ten (10) days written notice.

Accepted by John X Lessee

Form R-A Western Salesbook Co., 3049 E. 12th St., L. A., An. 1-0338

No. 5114-BH. McClintock vs. Westover. Plfs. Exhibit No. 5. Filed Jul. 9, 1946. Edmund L. Smith, Clerk; by MEW, Deputy Clerk.

No. 11587. United States Circuit Court of Appeals for the Ninth Circuit. Filed Apr. 19, 1947. Paul P. O'Brien, Clerk.

Q. By Mr. Yeamans: Mr. McClintock, what would be the effect of spilling ammonia on the rubber leaf decoration? A. It would turn it black.

Q. And if the ammonia had been spilled on the decoration and it had turned black and the market operator, Mr. John X, calls the salesman and informs him of that fact, what step would the salesman then take?

A. Well, he would visit the store and replace the soiled with fresh decoration.

Q. And he would do that at what time? [29]

A. At the earliest possible moment.

(Testimony of Everett C. McClintock)

The Court: And that would be at the expense of the butcher shop?

The Witness: No, no, that is done without any extra charge whatsoever.

Q. By Mr. Yeamans: In other words, I ask you to look at this document and tell me whether or not that is the type of ticket which would be filled out by the salesman as the result of such a transaction as we have just described.

A. Yes. This ticket must be filled out by the salesman or serviceman to show that he did visit the store and exchanged the decoration. He has the operator's signature. That has to come into our office in order to keep our records clear and the salesman's record clear.

Q. And exactly what does that ticket indicate? What is done?

A. Well, that ticket indicates that three pieces of rubber leaf decoration were exchanged and he indicates on the ticket that there was no charge made for that service.

Mr. Yeamans: We offer this as Plaintiff's Exhibit next in order.

The Court: It will be received.

(The document referred to was marked as Plaintiff's Exhibit No. 6, and was received in evidence.)

[PLAINTIFFS' EXHIBIT NO. 6]

Rental Agreement

McCLINTOCK DISPLAY COMPANY, Lessor

The Original Rubber Leaf Decoration

3044 Riverside Drive Phone MOrningside 12113

A22331 Los Angeles, Calif., Oct 13 1941

Lessee X Super Market

2000 Connecticut Ave

Newark New Jersey District

[ ] New Contract [ ] Picked Up

[ ] Added To [ ] Contract Cancelled

Rubber Leaf

Total Feet..... Total 18" Units.....

Total Holders Installed

3 Rubber Leaf Exchanged No Charge

Collected for ..... months

Rent Payable in Advance Total Collected

Rent from..... to.....

Received Rent Smith Representative

Merchandise installed is the property of McClintock Display Co. This lease is revocable by McClintock Display Co. or lessee upon ten (10) days written notice.

Accepted by John X Lessee

Form R-A Western Salesbook Co., 3049 E. 12th St., L. A. An. 1-0338

No. 5114-BH. McClintock vs. Westover. Plfs. Exhibit No. 6. Filed Jul. 9, 1946. Edmund L. Smith, Clerk; by MEW, Deputy Clerk.

No. 11587. United States Circuit Court of Appeals for the Ninth Circuit. Filed Apr. 19, 1947. Paul P. O'Brien, Clerk.

(Testimony of Everett C. McClintock)

Mr. Oakes: The same objection. It is incompetent, [30] irrelevant and immaterial.

Q. By Mr. Yeamans: You have stated that a periodic return was made by the salesman to the store. What period of time was that at this particular time we are talking about? A. Every 60 days.

Q. And on his return at the end of the 60-day period what steps would the salesman take?

A. He would make a survey of the case and determine the amount of rubber leaf decoration that was soiled or he will ask the owner what he wishes changed and replaced with fresh, clean decoration.

Q. And having learned that would he make the replacement?

A. Yes, he would replace it and quite often he would have to take all the meat out of the case and quite often replace holders that are soiled from blood and grease and so forth, along with the decoration.

Q. During that period of time approximately what per cent of each display was in fact changed? At the periodic service period?

A. That varies a great deal. As a rule, about 50 per cent. Sometimes it is 100 per cent that the men have to change at each service call.

Q. Does the salesman on making that exchange complete a ticket? [31] A. Yes, he must do that.

Q. I show you an instrument and ask you to look at it and tell us whether or not that represents the ticket that would have been filled out at the time of the periodic service?

(Testimony of Everett C. McClintock)

A. Yes. This ticket shows that he exchanged three 9-inch pieces, nine 15-inch, and 21 18-inch, and also 19 holders, and that he designates here that there was no charge made for that call or service on this particular ticket.

Q. And for exchanges of that sort no particular charge is made? A. That is right.

Q. That is all included in your periodic service charge?

A. That is correct.

The Court: May I ask counsel if the items that are placed in here upon which there has been an exchange, is that included in the tax that has been levied?

Mr. Yeamans: Were you addressing me, your Honor?

The Court: Both of you.

Mr. Yeamans: Yes, your Honor, the tax has been computed by taking the gross revenue which has been derived from all of these charges and stating that under this instrument it was leased and that accordingly—

The Court: I understand that, but what I am getting at is this the basis upon which they are taxed? For instance, in a case there is no charge there would be no revenue and no [32] tax.

Mr. Yeamans: No, not on this slip.

The Court: That is all I wanted to know.

Mr. Oakes: Where there is no charge for the document and hence no tax to be paid upon a charge, I think that is an additional reason why this is immaterial. I also object to it on the ground that it purports to be hypothetical.

(Testimony of Everett C. McClintock)

The Court: It is hypothetical, but your stipulation is hypothetical, the original exhibit that you introduced.

Mr. Oakes: That is correct.

The Court: The stipulation is hypothetical.

Mr. Oakes: But I don't know because we agreed to one hypothetical case we are bound to continue on agreeing to hypothetical cases.

The Court: What do you want these people to do? Do you want them to go out and dig up witnesses and bring them in?

Mr. Oakes: If your Honor desires to continue it, but there wouldn't be any point in my delaying the trial.

The Court: I am trying to get the facts. The plaintiffs are claiming they are a service organization and they are introducing evidence here as to their method of doing business. Technically your objection is good. It is hypothetical and if you want me to do so I will have them bring in their records.

Mr. Oakes: No, I do not seek to delay the trial because [33] that would be inconvenient to all concerned. However, if there is no tax based on these—

The Court: The only thing I am trying to find out is whether they were. That is the reason I asked the question. In view of the fact that the objection as far as being hypothetical is concerned and the Government not insisting that they bring in the actual records the objection will be overruled.

(Testimony of Everett C. McClintock)

Mr. Yeamans: We offer this as Plaintiff's Exhibit next in order.

The Court: It will be received.

(The document referred to was marked and Plaintiff's Exhibit No. 7, and was received in evidence.)

[PLAINTIFFS' EXHIBIT NO. 7]

Rental Agreement

McCLINTOCK DISPLAY COMPANY, Lessor

The Original Rubber Leaf Decoration

3044 Riverside Drive Phone MOrningside 12113

A22332 Los Angeles, Calif., Dec 1 1941

Lessee X Super Market
2000 Connecticut Ave
Newark New Jersey District

[ ] New Contract [ ] Picked Up

[ ] Added To [ ] Contract Cancelled

Rubber Leaf

3 – 9″ R.L.
9 – 15″ R.L.
21 – 18″ R.L.

Total Feet..... Total 18″ Units.....

Amount

19 Total Holders Installed

30 Rubber Leaf Exchanged No Charge

Collected for ..... months

Rent Payable in Advance Total Collected

Rent from..... to.....

(Plaintiffs' Exhibit No. 7)

Received Rent Smith Representative

Merchandise installed is the property of McClintock Display Co. This lease is revocable by McClintock Display Co. or lessee upon ten (10) days written notice.

Accepted by John X Lessee

Form R-A Western Salesbook Co., 3049 E. 12th St., L. A. An. 1-0338

No. 5114-BH-Civ. McClintock vs. Westover. Plfs. Exhibit No. 7. Filed Jul. 9, 1946. Edmund L. Smith, Clerk; by MEW, Deputy Clerk.

No. 11587. United States Circuit Court of Appeals for the Ninth Circuit. Filed Apr. 19, 1947. Paul P. O'Brien, Clerk.

Q. By Mr. Yeamans: Mr. McClintock, when the soiled decoration has been removed by the salesman from the market what disposition does the salesman make of that soiled decoration?

A. At the end of the day he will pack it in shipping cartons and ship it back to the factory for renovating.

Q. And when it is received in the factory what steps are taken?

A. Well, it is first unpacked. It is checked in there by a receiving clerk. He checks the number of pieces—

The Court: In substance he ascertains whether it can be renovated and that which cannot be is discarded and that [34] which can be renovated is renovated.

The Witness: Yes, sir.

The Court: Isn't that it?

(Testimony of Everett C. McClintock)

The Witness: At first he has to check the amount to see that is corresponds with the ticket.

The Court: That is immaterial.

The Witness: Yes. Well, it is sorted, your Honor. He sorts it out and determines which can be renovated and which cannot.

The Court: And that which can be renovated is placed back in stock for further use?

The Witness: Well, I don't know whether you are interested in hearing the process it goes through.

Mr. Yeaman's: May I say, your Honor, that we would like to show a little of the detail concerning this process.

The Court: You do not care to have him go into the detail as to who opens the boxes and how it is counted and those things.

Mr. Yeamans: I just meant the individual steps that it runs through at the plant.

The Court: All right.

Q. By Mr. Yeamans: Would you tell us the steps, as briefly as you can, that this is followed through the plant?

A. The first operation the metal, as you will see in this clip, has to be cleaned. It is run through buffing [35] machines to clean off the grease or blood and so forth. It is then placed in big machines for washing with special chemicals for cleaning the rubber. It is then placed individually on racks after it comes out of the machines and run into big drying rooms. And then as it comes out of the drying room it is sorted for the lengths and then it is run through a sterilizing and coating process to brighten

(Testimony of Everett C. McClintock)

it and then in the ovens for drying again and then it is repacked and shipped out.

The Court: How about the rubber? Do you renovate the rubber?

The Witness: Well, yes, that is the process I just explained to your Honor. That is how it is renovated.

The Court: Do you separate the rubber from the metal?

The Witness: No; the rubber is left in the metal clips but the machines and the washing machines will not remove the grease and grime and so forth from the metal clips, so that has to be done first through buffing machines to brighten it.

The Court: And the rubber is restored to its original color and appearance?

The Witness: Yes, sir.

The Court: And it is ready for the salesman again?

The Witness: Yes, it is packed and re-shipped.

Q. By Mr. Yeamans: And the freight on that soiled rubber leaf in and out of the plant is paid by the company? [36] A. Right.

Q. In your process you do use certain chemicals and other matters which are accounted for separately in the cleaning process? A. Correct.

Q. What steps are followed to replace the salesman's stock, briefly please?

A. Well, the salesman will determine what he is going to use in his next few weeks period of his work and will send in an order to the factory for that amount and it is shipped out.

The Court: In other words, you try to keep a salesman stocked with the necessary supplies?

(Testimony of Everett C. McClintock)

The Witness: Yes; the salesman plans to keep enough stock on hand for his regular work and also for new installations.

Q. By Mr. Yeamans: It will be noted from Plaintiff's Exhibit 4, that is Exhibit A attached to Exhibit 4, that the original period of time for which the charge was made was 90 days. Assume that the salesman from the McClintock Company returns to the X-Super Market what steps would he take at that time?

A. Well, he would return at his regular period—regular periodic service time or period and make the change or whatever was necessary or change the displays. And quite [37] often help the operator re-arrange his meat and show him new methods of displaying, which we do all the time.

The Court: You try to keep a satisfied customer?

The Witness: Well, we have found that by having our men trained in the modern method of displaying merchandise it has helped our business.

The Court: I say that is the idea, to keep a customer satisfied?

The Witness: Yes.

Q. By Mr. Yeamans: And if at that time he also collected a charge for a further period would he make out a ticket such as the one we have here?

A. That is correct.

Q. And what does that show?

A. That shows that he exchanged at this time 30 pieces of rubber leaf; he collected for two months period and again has the operator sign the ticket and he signs the ticket. It is a receipt that is given to the operator and the original is forwarded to our office for our record.

(Testimony of Everett C. McClintock)

Q. And what amount is shown that he collected?

A. Shows he collected for two months, monthly service of $3.67 or a total of $7.34.

Q. And there is no marking in any of the four squares at the top? A. No.

Mr. Oakes: The same objection, immaterial. [38]

The Court: The same ruling. It will be admitted.

(The document referred to was marked as Plaintiff's Exhibit No. 8, and was received in evidence.)

[PLAINTIFFS' EXHIBIT NO. 8]

Rental Agreement

McCLINTOCK DISPLAY COMPANY, Lessor

The Original Rubber Leaf Decoration

3044 Riverside Drive Phone MOrningside 12113

A22333 Los Angeles, Calif., Jan 2 1942

Lessee X Super Market

2000 Connecticut Ave

Newark New Jersey District

[ ] New Contract [ ] Picked Up

[ ] Added To [ ] Contract Cancelled

Rubber Leaf

Total Feet..... Total 18" Units.....

Amount

Total Holders Installed

30 Rubber Leaf Exchanged

Collected for 2 months 367

Rent Payable in Advance Total Collected 7 34

(Plaintiffs' Exhibit No. 8)

Rent from 1/1/42 to 3/1/42

Received Rent Smith Representative

Merchandise installed is the property of McClintock Display Co. This lease is revocable by McClintock Display Co. or lessee upon ten (10) days written notice.

Accepted by John X Lessee

Form R-A Western Salesbook Co., 3049 E. 12th St., L. A. An. 1-0338

No. 5114-BH. McClintock vs. Westover. Plfs. Exhibit No. 8. Filed Jul. 9, 1946. Edmund L. Smith, Clerk; by MEW, Deputy Clerk.

No. 11587. United States Circuit Court of Appeals for the Ninth Circuit. Filed Apr. 19, 1947. Paul P. O'Brien, Clerk.

Q. By Mr. Yeamans: If it be assumed that the manager of the market calls the salesman Smith to say that he has sold the delicatessen portion of the business and accordingly desires Smith to remove the decoration from the delicatessen counter, what steps would be taken at that time?

The Court: Counsel, I do not care to hear that. You have enough examples already.

Mr. Yeamans: I was going to illustrate the other thing which you asked. The only purpose that it has is to illustrate the meaning of that square.

The Court: You must assume that somebody can read and has ordinary intelligence. It is pretty well understood.

(Testimony of Everett C. McClintock)

Mr. Yeamans: There is no question about that except it illustrates he did not take the entire thing.

The Court: It would not make any difference if he took it all or not. He might have picked them all up or might have picked part of them up. What difference would it make?

Mr. Yeamans: It would make a difference in the way he filled out the slip.

The Court: What difference would it make how he filled out the slip? He testified as to how he was doing business in that respect. You testified about your plant, the differ- [39] ent steps that you take in processing this product and, as I understand it, you also manufacture these decorations, do you not?

The Witness: Yes, sir.

The Court: Out of rubber?

The Witness: Correct.

The Court: You are getting rubber now?

The Witness: Yes, we are getting rubber now.

The Court: Do you know from your own knowledge the investment that the plant has in machines that are used for renovating or the machines used in the original manufacture?

The Witness: No, I could not testify to that, your Honor. It is out of my department.

The Court: Well, do they use, for instance, machines to make these steel clips or do you make them?

The Witness: No, we make them right in the plant.

The Court: You have your own equipment for making them?

The Witness: Yes.

(Testimony of Everett C. McClintock)

The Court: And you paint them whatever color is on them in your own plant?

The Witness: Yes. That is all processed there.

The Court: And is the same machinery used when you renovate them or do you have special machines for it?

The Witness: No; that is different machinery for renovating than it is for making them. [40]

The Court: How many people do you employ, do you know?

The Witness: I could not tell you that to be correct on it. I had better not guess.

Q. By Mr. Yeamans: The steps which we have outlined here and the tickets which have been introduced are typical of those which occur constantly throughout the operation of your particular business?

A. That is correct.

Q. I hand you a card and ask you to look at it and tell me what it is?

A. This is one of our office record cards.

Q. And is that the original of the record?

A. Yes.

Q. That is not a hypothetical example?

A. No, sir; this is an original.

Q. And it is kept in the ordinary course of office accounting within your office? A. Correct.

Q. Will you please tell me what the card shows?

A. That shows that this particular account was opened on this date.

Q. What is the date? A. November 30, 1939.

Q. And does it show the amount—what date in 1939, please? [41] A. November 30th.

(Testimony of Everett C. McClintock)

Q. Does it show the amount of the service charge which was charged at that time?

A. Yes. The amount was 72 cents per month.

The Court: Counsel, this is before and is no part of the issue here. It does not come within the period we are concerned with.

Mr. Yeamans: We are now, your Honor, getting down to the proof of the fact that we did not add this service charge and the only case which I have found on the subject indicates the proper proof is a showing that the price in a particular case was the same before the date of the tax, during the date of the tax, and after the date of the tax. Accordingly we have produced for the purpose of satisfying that requirement our original records to establish what our price was before the tax, what our price was during the period of the tax, and what the price was subsequent to the period of the tax, to show that it was not added to the amount.

The Court: Does the Government dispute that?

Mr. Oakes: Well, we—

The Court: Or are you in the position of not knowing?

Mr. Oakes: We don't know whether they passed it or didn't pass it on.

The Court: I think instead of it going into the record there should be somebody who is in a position to [42] testify to the facts and then if you want to go into detail on your cross examination you may do so. I think that should be sufficient.

Mr. Oakes: I don't know how they will establish it. If it is a conclusion I would object to that.

(Testimony of Everett C. McClintock)

The Court: If a man has not raised his prices before and after, would that be a conclusion?

Mr. Oakes: Not the ultimate fact of whether the price changed or not. I don't think that would be a conclusion.

The Court: Well, you adopt your own method and when you have finished I will let you brief it. Generally we get some cooperation in these cases.

Q. By Mr. Yeamans: Are you familiar with the charges which were made by McClintock Company for its service from the period 1939 onward? A. Yes.

Q. What were those charges in the case of chain stores, approximately?

A. Approximately five cents per unit.

Q. When you say "per unit" you refer to a 19 or 18-inch length of rubber? A. Yes, sir.

The Court: Five cents for a month?

The Witness: Yes, five cents a month for an 18-inch unit. [43]

Q. By Mr. Yeamans: Did that charge change in 1940? A. No.

Q. Did it remain the same in 1941?

A. Yes, sir.

Q. And the same in 1942? A. Yes.

Q. And the same in 1943? A. Yes.

Q. What charge was made on the average to independent stores in 1939?

A. The average was about 7 cents per unit per month.

Q. That would be 7 cents per month each 18-inch unit of rubber leaf decoration. Did that charge change in 1940? A. No.

Q. Did it change in 1941? A. No, sir.

Q. Did it change in 1942? A. No, sir.

(Testimony of Everett C. McClintock)

Q. Did it change in 1943? A. No, sir.

Q. In other words, from the period 1939 to 1943 there was no increase in the prices charged by the McClintock Display Company for its services?

A. None whatever. [44]

The Court: Was there any amount added at any time on account of any tax?

The Witness: No.

Mr. Yeamans: I believe that is all from this witness, your Honor.

The Court: Cross examine.

Mr. Oakes: No cross examination.

The Court: That is all.

Mr. Yeamans: Mr. Triesch.

C. R. TRIESCH,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name please.

The Witness: C. R. Triesch.

Direct Examination

By Mr. Yeamans:

Q. What is your home address, Mr. Triesch?

A. 1120 North Jackson Street, Glendale.

Q. And your present occupation?

A. Manager of McClintock Display Company.

Q. When were you first employed by McClintock Display Company? A. In 1935.

(Testimony of C. R. Triesch)

Q. In what capacity, Mr. Triesch? [45]

A. Bookkeeper.

Q. What was the next capacity which you were employed by the company?

A. Approximately two years later I was employed as manager for the company.

Q. Have you been manager for the company ever since then? A. Yes.

Q. Mr. Triesch, it has been testified by Mr. McClintock that the tickets made out by the salesmen are sent to the home office. Would you tell the circumstances under which those tickets are sent?

Mr. Yeamans: May I say, your Honor, that we are at this point—we desire to show the use of that ticket in the office as well as the fact that we incur additional expense in this connection and it is for that purpose that these questions are asked.

The Court: I do not see the materiality of that, counsel

Mr. Yeamans: It is only to establish—what I propose to do, your Honor, is establish the amount of expense we incur in connection with our service.

The Court: Counsel, I do not think I will admit it. I am frank to say that I question seriously its admissibility. These are either on a rental basis or on a service basis.

Mr. Yeamans: That is right. [46]

The Court: And if it is a rental the expense in renting them is, I think, in the same category as a salesman's expense or the same category as advertising. That is your cost of selling, selling your service or selling your rental contracts.

(Testimony of C. R. Triesch)

Mr. Yeamans: What I wanted to show was the fact that by incurring this expense we incur an expense which is disproportionate to the initial cost of the item and so disproportionate that the factor of expense itself indicates that we cannot be simply renting an item.

The Court: Well, whether you are renting them or it is a service, it is apparent that this is not a charitable institution that you are running.

Mr. Yeamans: That is true.

The Court: And whichever way you run it, it is run for profit and apparently it has been profitable because it is almost amazing to see the extent that an idea such as this has grown.

Mr. Yeamans: I wanted to make that statement before I went ahead with this—

The Court: Go ahead.

Q. By Mr. Yeamans: In sending in the sales tickets, Mr. Triesch, what do the salesmen do?

A. Once each week each salesman is required to send in to the company what is known as Form 2.

Q. I show you an instrument and ask you whether or not [47] that is the Form 2 to which you refer?

A. This is it.

Q. What does the salesman show on that Form 2?

A. He shows the individual amounts collected from the customer or the market. He must total them and also on the face of this ticket he would show the expense incurred by him for the week.

Q. How much expense does he show in this case?

A. In this case he shows an expense of $5.15.

(Testimony of C. R. Triesch)

Q. Can you say from the ticket what that expense would be for?

A. No, we cannot. Ordinarily he would attach a voucher showing what the expense is for. If there is no voucher attached we would assume that it was for mileage or automobile expense.

Q. How would he establish his mileage or automobile expense?

A. The company pays a set sum of five cents per mile to the salesman for the use of his car.

Q. I notice there is an entry down here which shows debit and credit. Will you explain that, please?

A. Yes. That is accounting—our bookkeeping entry. After these Form 2's are checked with the tickets which would accompany this report to the office from which the record is made, at the top an accounting entry would have to be made [48] what we call a T account showing at the bottom on the debit side the actual amount of money received, the expense involved on the debit side and on the credit side the total service charges which were collected.

The Court: You say "service charges, total amount collected"?

The Witness: Yes.

The Court: From these slips that have been sent in?

The Witness: From these slips.

Mr. Yeamans: And the slips in this particular case would be Exhibit A attached to Plaintiff's Exhibit 4 and Plaintiff's Exhibit 5.

The Court: On those forms?

Mr. Yeamans: On these two, yes.

The Witness: Yes.

(Testimony of C. R. Triesch)

Mr. Yeamans: We offer the form in evidence as Plaintiff's Exhibit next in order.

The Court: I do not see how it is material at all, counsel. I do not see where it tends to prove or disprove anything.

Mr. Yeamans: It brings us down to the question of our expenses, your Honor, and there are other expenses.

The Court: That does not make any difference. Even if he spent more than he took in, that would not make any difference. That does not tend to prove or disprove anything. [49] The cost of selling is there. There is no difference. We have the Supreme Court decision where they refused to allow the cost of advertising. I don't think the cost of selling and the cost of doing business is any different in that case, 323 U. S.

Mr. Oakes: F. W. Fitch?

The Court: Yes.

Mr. Yeamans: In other words, this could very well be a strictly selling expense. We do have some others.

The Court: But whether it is a service or selling, you have an expense. You compared this business to a laundry service. They hire men to go out and deliver the laundry and they collect the money, and they also have their automobile expense and at the end of the day or the end of the week they have to check up. There is constant expense. It does not make any difference whether you run a service or a rental proposition, you are going to have expense.

Mr. Yeamans: That is true.

The Court: And the expense would be just the same—it would not vary.

(Testimony of C. R. Triesch)

Mr. Yeamans: It would in connection with the renovation of these. If we did not renovate them then our expense would be vastly different.

The Court: You might rent an automobile and just because you did not furnish a new automobile every time but went to [50] the expense of repairing that automobile, that would not change the picture.

What I am trying to do is show you that what you are offering here, as far as I am concerned, does not tend to prove or disprove any of the issues in this case. There is one factual issue—is this a service organization?

Mr. Yeamans: Yes, your Honor.

The Court: Now, whether it is a service organization or a rental proposition you would have the same expense.

Mr. Yeamans: Yes, except insofar as our renovation is concerned.

The Court: Even if you rented the material you would have that renovating expense. The only reason you renovate the material now is because it is less expensive than to furnish new material.

Mr. Yeamans: Well, of course, if we furnished new rubber leaf we could not make any money.

Mr. Oakes: Well. I want my objection—

The Court: I am going to sustain the objection. It will be marked for identification.

(The document referred to was marked as Plaintiff's Exhibit No. 9, for identification.)

Mr. Yeamans: Do I understand, then, your Honor,—it may be that I am proceeding incorrectly in part here—if your Honor should rule that the ticket is not and of itself a lease, [51] that if your Honor should still rule

(Testimony of C. R. Triesch)

that our arrangement is a renting one rather than a service arrangement, that your Honor would find that the tax was due then on the gross revenue denied?

The Court: There is no argument about that, is there? If there is any tax due the tax is due on your gross revenue, isn't it?

Mr. Yeamans: No, your Honor, that would not be true. If we use it in connection with the operation of a business the tax is on the fair value of the article used. We are not disputing that we owe a tax. We admit that we owe the tax. It is merely the manner in which the tax is to be computed. We contend that it is to be computed on the fair value of the article which we have because we use it in a business.

The Court: Well, as I understand, you have different columns here, the way you figure, but as I understand those are questions of law.

Mr. Yeamans: That is true.

The Court: Now, the one factual question in this case is whether you, strictly speaking, were renting these decorations or were furnishing a service and that these decorations simply represent your stock in trade for the carrying on of that service. Now, that is your contention, is it not?

Mr. Yeamans: Not quite, sir. Our contention is that within the purview of the law and the regulations that we use [52] these articles in the operation of a business in which we were engaged.

The Court: Where is your statement different from mine?

Mr. Yeamans: The only difference would be—

(Testimony of C. R. Triesch)

The Court: You worded it a little differently. You may proceed.

Q. By Mr. Yeamans: Mr. Triesch, when the ticket, when the form which is attached to Plaintiff's Exhibit 4 is received in the office of the McClintock Display Company, what entries are made on the records of the McClintock Display Company from that form?

A. First it would be turned over to a typist who would make up this yellow control card and on that she would type the date of installation, the ticket number, the name of the salesman and the name and address of the market. And also on the card she would indicate on the first line the date again of installation, the amount of the service charge for the month and the date to which it is paid. And under the column marked "Credit", the amount collected, and that is extended also into the balance column.

Q. And all of those figures are taken from that little ticket? A. Yes, sir.

Q. Does she make any other entries on the card from that little form of ticket? [53]

A. Yes. From the right—I assume that is dated October 1st, to the right of the black line she would again put down the date.

Mr. Oakes: I object. They are talking about what she puts down on a certain card. The card is the best evidence of that.

The Court: Yes, but the court needs an explanation of that which appears on the card.

Mr. Oakes: Well, I don't understand that they have the card here. I have not seen the card.

(Testimony of C. R. Triesch)

The Court: He is using a card now. He has it in his hand.

Mr. Oakes: I understood the witness to be testifying from this ticket.

The Court: This ticket is a hypothetical ticket.

Mr. Yeamans: From Exhibit A attached to Plaintiff's Exhibit 4, the employee would make the entries on the yellow form which Mr. Triesch now holds, is that correct, Mr. Triesch?

The Witness: That is right.

Q. By Mr. Yeamans: And she would have made the entries as you described?

A. On the first line, but also on the first line she would have to indicate the date and the amount of rubber leaf installed, which in this case is 20. Extend that over into the balance column. Also indicate the number of holders [54] installed.

The Court: What does all this prove, counsel? Simply that the company kept a record of each one of these transactions. It means he has a card covering a particular market and the service that they rendered to them and how much they collected for it.

Mr. Yeamans: And that the entries on this card would be made in each case from—

The Court: Certainly they keep a record. They are keeping a close record on their business. That is simply good business. Whether it was a rental business or a service business they would do the same thing.

Mr. Yeamans: That is true, your Honor, but I am attempting to overcome the Government's contention that this little printed form is a lease.

(Testimony of C. R. Triesch)

The Court: There is nothing on there that indicates it is anything to the contrary.

Mr. Yeamans: The manner in which it is used would indicate it is nothing more than an accounting slip because when it gets to the home office they simply make the entries from it to this accounting card, and it is filed away.

The Court: Counsel, it is quite apparent that the so-called rental agreement, at least one of the purposes of it, was so that the market owner would admit the ownership in the plaintiff here and that he could make no claim as to [55] owning the article. Now, that is one of the purposes of that agreement, having him sign it, so there would be no question of the ownership and title to these products.

Mr. Yeamans: That is true, your Honor, and I was simply proposing to show the other uses to which it was put.

The Court: I do not care whether you call it rental or call it service, they would still keep these records.

Mr. Yeamans: Will you stipulate that it is not a lease?

The Court: No, I don't think counsel would stipulate that. If he did there would be no lawsuit here.

Mr. Oakes: You mean that ticket there?

Mr. Yeamans: Yes.

Mr. Oakes: The ticket which is attached to the stipulation we, of course, contend that is a lease.

The Court: But that does not tend to prove or disprove anything. I am speaking of your method of accounting. Where does your method of accounting show anything?

(Testimony of C. R. Triesch)

Mr. Yeamans: It shows what this ticket is put to. It shows one of the uses at least.

The Court: Proceed. Let me ask this witness a question. This ticket comes to you and you keep a minute record of the information needed so you can keep track of that customer and what he has?

The Witness: Yes, sir.

The Court: And it is also to keep track of whether he [56] owes you anything?

The Witness: Yes, sir. Also, it is a record to show what the salesman has left at the market so his inventory—

The Court: For inventory purposes?

The Witness: Yes, sir.

Q. By Mr. Yeamans: In other words, you use it to accounting information off of it in detail? A. Yes.

Q. And the information which is contained on this card was taken from the various tickets? A. Yes.

Q. That have been introduced here, being in the form of Exhibit A attached to Plaintiff's Exhibit 4?

A. Yes.

Mr. Yeamans: We offer this in evidence as Plaintiff's exhibit next in order.

The Court: It will be admitted. It does not prove or disprove anything. Counsel, if this were a sale or a service or a rental agreement they would still have a record of it. That is simply good business.

(The document referred to was marked as Plaintiff's Exhibit No. 10, and was received in evidence.)

The Court: How long have you been with the company?

(Testimony of C. R. Triesch)

The Witness: Since 1935.

The Court: Have they always used this form? [57]

The Witness: That form was in existence—I believe that same form was in existence when I came with the company.

Q. By Mr. Yeamans: Where do you obtain the forms?

The Court: You have them printed, don't you?

The Witness: Some printing company or loose-leaf—I don't know the name of the company but some book concern.

The Court: It doesn't make any difference. It shows here who printed it.

Q. By Mr. Yeamans: During the period from October 1st, 1941 to October 31, 1942, how many times on the average in the course of a year was each 18-inch unit of rubber leaf renovated?

Mr. Oakes: Object to that as immaterial.

The Court: If he knows he may answer.

A. I do not know the number exactly. I could tell you approximately and the record would prove out that fact.

Q. By Mr. Yeamans: On the average could you say?

A. Close to the average, yes.

Q. What would that be?

A. Approximately four times.

Q. In other words, each 18-inch unit comes in four times a year for renovation? A. Yes, sir.

Q. About how many of these tickets which are in the form of Exhibit A attached to Plaintiff's Exhibit 4,

(Testimony of C. R. Triesch)

were [58] received during the period under consideration by the home office in the course of a year, if you know?

A. I would not know the exact amount. I know there is a great quantity. If I said 2,000 a month or 2,500 a month—there are quantities of them arriving.

The Court: That shows you took in plenty of money.

Q. By Mr. Yeamans: And there were a great number of tickets involved?

The Court: Certainly. That is assumed, because the amounts, apparently, do not run large.

Mr. Yeamans: No, your Honor.

The Court: It is an accumulation of small amounts.

Q. By Mr. Yeamans: Are you familiar with the prices which have been charged by the McClintock Display Company during the period you have been there?

A. Yes, sir.

Q. Are you familiar with the prices charged during the year 1939?

A. There were various prices according to the size of the markets.

Q. Well, in the case of chain stores, what was the average charge?

A. That price was very close, approximately five cents a unit per month.

Q. In 1939? [59] A. Yes, sir.

Q. Was there any change made in that charge in 1940? A. No.

Q. Was it increased in 1941? A. No, sir.

(Testimony of C. R. Triesch)

Q. Was it increased in 1942? A. No, sir.

Q. Was it increased in 1943? A. No, sir.

Q. In 1939 what charge was made for independent markets?

A. They were in varying amounts also and I think the average would be around 7 cents per unit.

Q. And was any increase in that price made in 1940?

A. No, sir.

Q. Was it increased in 1941? A. No, sir.

Q. Was it increased in 1942? A. No, sir.

Q. Was it increased in 1943? A. No, sir.

Q. During the period from 1939 to 1943 was there any amount added to the service charge which was collected by the McClintock Display Company by way of taxes?

Mr. Oakes: I object to that as calling for a conclusion.

The Court: If he knows. He is the general manager. [60]

Mr. Oakes: Well, it is characterized as to whether an amount was added by way of taxes.

The Court: The question is whether they passed on this tax that you are collecting to the customer. That is what you are claiming here. Of course, if he passed it on to the customer he would not have any standing.

Mr. Oakes: Well, it could be passed on in different ways and the ultimate issue, I think, is the effect of whether they re-couped by recovering additional amounts from their customers. Presumably the customers would

(Testimony of C. R. Triesch)

have to buy it from someone who would pay whatever taxes were legally due, and if there was competition they might be able to pay more, and I don't know what they mean when they said "as tax". It could be passed on without being labeled taxes, so it does not necessarily prove the point, to put it in the form of passing it on as taxes, if I understand the question correctly.

Mr. Yeamans: Well, it is one of those conclusions—

The Court: Just a moment. May I ask did you at any time alter your prices during the period in which this tax was claimed to have accumulated so as to include in your price the tax?

The Witness: You are speaking of the United States Federal Tax?

The Court: Yes.

The Witness: No, sir. [61]

The Court: That is the excise tax involved in this case.

The Witness: No, sir; we did not.

Mr. Yeamans: I believe that is all from this witness, your Honor.

Mr. Oakes: No cross examination.

The Court: That is all.

Mr. Yeamans: We would like at this point on behalf of the plaintiff, to offer in evidence for the purposes stated therein, the matter contained in the supplemental stipulation of facts which has previously been filed herein, reserving the right to prove the cost therein detailed as

offsets against the tax in the event that it should be ruled that the tax is due by virtue of a lease or rental agreement. And if counsel for the Government would prefer, I am prepared to offer them individually, item by item—

Mr. Oakes: If your Honor has read and particularly noted paragraph 4 of that supplemental stipulation—

The Court: Gentlemen, I am here to try this case. I want to get all the evidence in that I can and then I wanted it submitted on briefs.

Mr. Yeamans: It is for that purpose that I was offering this, your Honor.

Mr. Oakes: If I may continue—that paragraph 4 indicates that we went to considerable pains to state the conditions under which we would agree to factual data, which [62] we considered wholly immaterial. Now, those scheduled in the supplemental stipulation in our opinion do not have anything to do with the ultimate issue of whether this was a lease or whether it was a service arrangement, as opposing counsel apparently contends. But in the interest of allowing these facts to go in with a minimum of difficulty we did stipulate, provided the facts in the supplemental stipulation were addressed only to that issue.

Now, we object to them being used for any other issue. I think that counsel has just intimated, if I understand him correctly, that they might be interested in seeking deductions or exclusions with respect to the gross rentals or revenues derived from this business, and we object to the raising of such an issue.

The Court: Why not let the facts go in and then you gentlemen can argue it out in your briefs? I agree with your contention but when it comes to a tax matter I never make a definite commitment until I have had an opportunity to examine all the authorities and argument of counsel.

Of course it seems to me, whether this was a rental agreement or service, they were rendering, that these items set forth in paragraph 3 would be immaterial. But it may be that they have some materiality and I do not want to pass on it now.

Mr. Oakes: Well, I can appreciate your Honor's position, [63] but I do want to say that when neither their refund claim nor their pleadings raise any issue as to reducing the measure of the tax by exclusion or deductions and when they raise that point now they haven't got it pleaded.

The Court: The Supreme Court in the case I cited a little while ago probably determined any question in that respect.

Mr. Oakes: Well, I am afraid they are seeking deductions and they don't have the pleading to support a claim for deductions. I want the record to show that I am objecting to this evidence on an issue which is not raised by the pleadings or raised by the refund.

The Court: It will be admitted. I don't know why it has to be admitted in evidence, however. It is a supplemental stipulation of facts and it is binding on both parties.

Mr. Oakes: It is binding on us for the limited purposes stated.

The Court: The stipulation is binding. The contents of the stipulation are binding upon both parties. It is an agreement between the parties.

Mr. Yeamans: The stipulation reserved the right to object, your Honor. That is all. I simply wanted to be sure that Government counsel had his full opportunity to make such objection as he sees fit.

The Court: And he has objected. It may be received. [64]

(The document referred to was marked as Plaintiff's Exhibit No. 11, and was received in evidence.)

[PLAINTIFFS' EXHIBIT NO. 11]

In the District Court of the United States in and for the Southern District of California, Central Division

L. H. and Florence L. McClintock, d.b.a. McClintock Display Co., a copartnership, Plaintiffs, vs. Harry C. Westover, Collector of Internal Revenue, Defendant.

No. 5114-O'C-Civ.

SUPPLEMENTAL STIPULATION OF FACTS

It Is Hereby Stipulated and Agreed, by and between counsel for L. H. and Florence L. McClintock, d.b.a. McClintock Display Co., a copartnership, plaintiffs, and Harry C. Westover, Collector of Internal Revenue for the Sixth District of the State of California, defendant, that, for the purpose of the above entitled action, and all proceedings therein, the following facts shall be deemed to be true and correct:

(Plaintiffs' Exhibit No. 11)

I.

That during the period from October 1, 1941, to October 31, 1942, plaintiffs' costs relating to new eighteen (18) inch units manufactured during that period were as follows:

Green Rubber				
Produced during period:				
No. IX Thin Pale Latex Crepe—70 batches of 60 pounds each—4,200 pounds at 21.375¢ per pound			$ 897.75	
Processing—6,600 pounds at 13.5¢ per pound			891.03	
Chemicals—70 batches at $4.93 each			345.10	
Cost of 6,600 pounds of green rubber at 32.33¢ per pound			$ 2,133.88	
Add inventory at beginning—13,812 pounds at 32¢ per pound			4,419.84	
			$ 6,553.72	
Deduct inventory at end—none			—0—	
Green rubber used—20,412 pounds at 32.01¢ per pound				$ 6,553.72
Use tax on rubber used—3% of $897.75				26.93
Metal clips and holders:				
Material purchased			$ 348.57	
Add inventory at beginning			965.91	
			$ 1,314.48	
Deduct inventory at end			141.94	
Metal cost of clips used				1,172.54
Dipping:				
Chemicals purchased			$19,947.96	
Add inventory at beginning			569.77	
			$20,517.73	
Deduct inventory at end			7,904.95	
Material used			$12,612.78	
Forwarded				$ 7,753.19
Allocated to production of new units on the basis of production.				
New units	82,170	7.91%	$ 997.67	997.67
Service units	957,197	92.9	11,615.11	
Total	1,039,367	100.00%	$12,612.78	
Sewing materials				324.40
Direct labor				4,989.79
Manufacturing overhead				2,404.57
Cost of producing 82,170 new units (20.043 cents each)				$16,469.62

(Plaintiffs' Exhibit No. 11)

II.

That during the period from October 1, 1941, to October 31, 1942, plaintiffs' costs relating to cleaning, brightening and repairing used units were as follows:

Materials:				
Laundry supplies purchased			$ 1,735.60	
Add inventory at beginning			207.37	
			$ 1,942.97	
Deduct inventory at end			1,155.69	
Supplies used				$ 787.28
Dipping:				
Chemicals purchased			$19,947.96	
Add inventory at beginning			569.77	
			$20,517.73	
Deduct inventory at end			7,904.95	
Materials used			$12,612.78	
Forwarded				$ 787.28
Allocation to production of new units on basis of units processed:				
New units produced	82,170	7.91%	$ 997.67	
Used units processed	957,197	92.09%	11,615.11	11,615.11
	1,039,367	100.00%	$12,612.78	
Direct Labor				11,591.71
Overhead Expense—Allocated				5,586.70
Cost of cleaning, etc., used units (Cost of processing each used unit 3.09035¢)				$29,580.80

III.

That during the period from October 1, 1941, to October 31, 1942, plaintiffs incurred the following expenses in connection with the operation of their rubber leaf busi-

(Plaintiffs' Exhibit No. 11)

ness, no part of which has been deducted in computing "Gross Revenue" in Paragraph VII of the Stipulation of Certain Facts, heretofore filed herein.

	Amounts Withheld by Agents as Commissions	Salesmen's Salaries	Salesmen's Traveling Expense	Freight In and Out	Cleaning, Brightening & Repairing Rubber Leaf
1941					
October	$ 2,050.15	$ 3,538.61	$ 1,967.20	$ 1,215.80	$ 2,207.17
November	2,746.73	3,601.31	1,558.77	1,078.42	2,415.46
December	2,004.42	5,371.40	2,081.88	1,633.40	3,043.11
1942					
January	2,344.62	3,680.70	1,413.98	570.24	2,450.38
February	2,348.54	3,664.47	1,608.55	1,525.29	2,800.11
March	2,544.93	3,692.02	1,513.90	878.48	2,793.25
April	2,949.15	3,425.88	1,421.82	1,081.05	2,420.49

	Amounts Withheld by Agents as Commissions	Salesmen's Salaries	Salesmen's Traveling Expense	Freight In and Out	Cleaning, Brightening & Repairing Rubber Leaf
1942 (continued)					
May	$ 2,633.17	$ 3,226.85	$ 1,139.35	$ 857.40	$ 1,540.26
June	2,255.76	3,274.91	1,316.84	1,147.97	2,208.15
July	2,991.50	3,083.71	1,243.31	1,096.91	2,105.73
August	2,788.42	2,806.21	1,131.34	795.70	2,067.54
September	1,747.92	2,820.82	986.49	880.87	1,457.72
October	2,204.17	2,729.97	1,147.17	806.63	2,071.43
	$31,609.48	$44,916.86	$18,530.60	$13,568.16	$29,580.80

IV.

It is the understanding of all the parties, and it is hereby expressly agreed, in the event this Supplemental Stipulation of Facts, or any portion thereof, is offered and received in evidence, that the facts herein stipulated to be true may be considered by the Court as evidence for

(Plaintiffs' Exhibit No. 11)

the limited purpose only of supporting plaintiffs' contention that, during the period from October 1, 1941, to October 31, 1942, plaintiffs were engaged in the operation of a business in which they used their product, (such contention being denied by defendant and contrary to the determination of the Commissioner of Internal Revenue herein), it being expressly hereby understood that the defendant shall have the right at any time to make objection to the materiality or relevancy of any or all of said facts to any of the matters in issue, the purpose of this Supplemental Stipulation of Facts being solely to establish the truth of the facts herein contained and to limit consideration of them as hereinabove stated.

V.

It is the further understanding of all the parties, and it is hereby expressly agreed, that plaintiffs, by signing this Supplemental Stipulation of Facts, shall not be deemed to have waived the right to offer any other evidence they may desire to offer, for any purpose whatsoever, in the same manner as if this Supplemental Stipulation of Facts had not been signed, subject to the right of the defendant, at any time, to object to the introduction of any such evidence, on any grounds in the same manner as if this Supplemental Stipulation of Facts had not been signed, it being the intention and purpose of the parties to limit the use of this Supplemental Stipulation of Facts to the pur-

(Plaintiffs' Exhibit No. 11)

pose set forth in Paragraph IV hereof, but not in any other manner to limit the rights of the parties hereto.

Dated: May 31, 1946.

JOHN T. RILEY and
RICHARD K. YEAMANS
By Richard K. Yeamans
Attorneys for L. H. and Florence L. McClintock, d.b.a. McClintock Display Co., a copartnership, Plaintiffs

CHARLES H. CARR
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E. H. MITCHELL and
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EUGENE HARPOLE, Special Attorney
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[Endorsed]: Filed May 31, 1946. Edmund L. Smith, Clerk; by E. M. Enstrom, Jr., Deputy Clerk.

No. 5114-BH. McClintock vs. Westover. Plfs. Exhibit No. 11. Filed Jul. 9, 1946. Edmund L. Smith, Clerk; by MEW, Deputy Clerk.

No. 11587. United States Circuit Court of Appeals for the Ninth Circuit. Filed Apr. 19, 1947. Paul P. O'Brien, Clerk.

Mr. Yeamans: We expected one thing more, your Honor, but I believe it is not necessary and the plaintiff will rest.

Mr. Oakes: Defendant has no evidence.

The Court: Very well, gentlemen. I will allow you 15, 15, and 10 days, and the 15 days to start upon the receipt of the transcript.

Mr. Yeamans: Thank you, your Honor.

The Court: Will the court be furnished with a copy of the transcript?

Mr. Yeamans: If you desire it.

The Court: If you are going to refer to it in your brief you will have to furnish me with one or set it forth in your brief.

Mr. Yeamans: Will the reporter see that the court is furnished with a copy of the transcript, please?

The Court: Very well, the case will stand submitted, gentlemen.

(Whereupon, at 11:45 o'clock a.m., the proceedings in the above entitled matter were concluded.)

[Endorsed]: Filed Apr. 8, 1947. [65]

[Endorsed]: No. 11587. United States Circuit Court of Appeals for the Ninth Circuit. L. H. McClintock and Florence L. McClintock, copartners, doing business under the fictitious name and style of McClintock Display Company, Appellants, vs. Harry C. Westover, Collector of Internal Revenue, Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed April 16, 1947.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals for the Ninth Circuit

No. 11587

L. H. and FLORENCE L. McCLINTOCK, dba McCLINTOCK DISPLAY CO., a copartnership,

Appellants,

vs.

HARRY C. WESTOVER, Collector of Internal Revenue,

Appellee.

STATEMENT OF POINTS UPON WHICH APPELLANTS INTEND TO RELY ON APPEAL

Pursuant to Rule 19, Subdivision 6, of the Rules of the Circuit Court of Appeals for the Ninth Circuit, the following is a statement of the points upon which appellants intend to rely on appeal:

I.

The Court erred when it construed the so-called "Rental Agreement" as a lease in legal contemplation.

II.

The Court erred when it construed the so-called "Rental Agreement" as a lease of the type which Congress contemplated when it inserted the word "lease" in Section 3440 of the Internal Revenue Code.

III.

The Court erred when it determined that appellants did not use their product in the operation of a business in which they were engaged within the meaning of Section 3444 of the Internal Revenue Code.

IV.

The Court erred when it failed to construe Section 3441 (b), Internal Revenue Code, as prescribing the measure of the tax in the case of a taxable sale, other than a taxable sale at wholesale, and it further erred when it failed to construe Section 3441 (c), Internal Revenue Code, as prescribing the time of payment of the tax in the limited instances therein referred to.

Dated April 4th, 1947.

JOHN T. RILEY and
RICHARD K. YEAMANS
By Richard K. Yeamans
Attorneys for Appellants

[Endorsed]: Filed Apr. 16, 1947. Paul P. O'Brien, Clerk.